92-1833

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term, 1992

IN THE MATTER OF THE HONORABLE
ROLF LARSEN, JUSTICE OF THE
PENNSYLVANIA SUPREME COURT

HONORABLE ROLF LARSEN, PETITIONER

APPENDIX II

PAGES 184 – 287

Rolf Larsen, Pro Se
2800 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 565-3000

10PT

TABLE OF CONTENTS
for Appendix II

	Page
Supplemental Omnibus Application	184
JIRB Order of June 29, 1988	213
JIRB Order of July 5, 1988	214
JIRB Notice of Hearing of November 14, 1988	215
Second Application for Writ of Prohibition, etc. and/or Second Application for Extraordinary Relief	216
Amendments to Second Application for Writ of Prohibition	260
Order of December 21, 1988, Denying Second Application for Writ of Prohibition	277
Letter of resignation from the Judicial Inquiry and Review Board of former Judge Edmund B. Spaeth, Jr.	278
Affidavit of Richard A. Sprague, Esquire (6-9-88)	283
JIRB Order dated October 11, 1988	286
JIRB Order dated October 31, 1988	287

In The

Supreme Court of Pennsylvania

JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
THE HONORABLE ROLF LARSEN

Board Matter Number 140

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Omnibus Supplemental Application within twenty (20) days from service hereof. Failure to file such a written response (answer) to said averments set forth in the Omnibus Supplemental Application within twenty (20) days shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

IN THE MATTER OF
THE HONORABLE ROLF LARSEN

Board Matter Number 140

SUPPLEMENTAL OMNIBUS APPLICATION

APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V; APPLICATION FOR STAY OF PROCEEDINGS OR FOR DISMISSAL; APPLICATION TO SEVER CHARGES; APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERNATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS; APPLICATION TO DISMISS ORIGINAL CHARGES I AND II ON GROUNDS OF DOUBLE JEOPARDY; APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROCECUTORIAL MISCONDUCT; APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/ REAPPROVED CHARGES" III, IV, and V

1. Justice Rolf Larsen is the respondent at Judicial Inquiry and Review Board Matter 140.

2. On May 24, 1988, following preliminary investigation and notice to respondent mandated by Rule 1 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (hereinafter Rules), the Board filed a Notice of Institution of Formal Proceedings against respondent charging him with two counts of allegedly improper conduct.

3. These two charges alleged, in essence: Charge I - that

respondent violated Canons 1, 2 and 3A(4) of the Code of Judicial Conduct by engaging in an *ex parte* communication with Judge Eunice Ross, a member of this Board, regarding a matter involving attorneys Robert O. Lampl and James Ashton, the latter of whom had a personal relationship with respondent and handled a real estate transaction wherein respondent purchased "approximately 38 acres of land in Fairfield Township, Westmoreland County" from Nikolai Zdrale; Charge II - that respondent violated Canons 1 and 2 "by his conduct in pursuing an appeal of zoning variances granted" to real estate developer Frank DePlacido and in pursuing a financial settlement to withdraw his appeal.

4. Hearings on these charges were originally scheduled to commence on July 18, 1988.

5. Counsel for respondent strenuously opposed this hearing schedule as a sudden "rush to judgment" after the Board took over a year to investigate and prepare its case, because it was an inconvenient time (summer vacation schedule) to interview witnesses and arrange for their appearances, because respondent's official duties as a member of the Pennsylvania Supreme Court at that time interfered with his ability to adequately prepare for a July 18, 1988 hearing, and because pretrial motions had yet to be disposed of, including respondent's Application for Disqualification of All Members of the Judicial Inquiry and Review Board which Application and Board Response is incorporated herein by reference.

6. A continuance was granted and hearings were scheduled to commence on August 22, 1988 before a three-member hearing committee consisting of the Honorable Alex Bonavitacola (designated Chairman of said committee), Mr. James H. Higgins, and Mr. Lawrence T. Hoyle, Jr., Esquire.

7. On August 16, 1988, citing personal reasons and expanded duties in connection with an organization of Pennsylvania judges, Judge Bonavitacola resigned from the Board some four and one-half months before his term of office would have naturally expired on January 1, 1989; the vacancy created by Judge Bonavitacola's sudden resignation has not been filled to date by the appointing body, the Pennsylvania Supreme Court.

8. Following requests by counsel for respondent for all

"*Jencks*" (*Jencks v. United States*, 353 U.S. 657 (1957)) and "*Brady*" (*Brady v. Maryland*, 373 U.S. 83 (1963)) material in the possession of Board Counsel, and the Board Counsel's partial compliance with this request, hearings did, in fact, commence on August 22, 1988 in Harrisburg.

9. The Honorable James E. Rowley was designated as Chairman of the hearing committee, but recused himself on August 22, 1988 upon request when it became apparent (from certain "*Brady*" material belatedly turned over to counsel for respondent on the literal eve of trial) that Judge Rowley would become a material witness in this proceeding as he had rendered a statement exculpatory to respondent in his interview with Board investigators flatly contradicting Board witness Judge Ross' statements on certain critical points.

10. The Honorable James M. Munley was then appointed to and designated the Chairman of the hearing committee, and the evidentiary hearing commenced on August 23, 1988.

11. Evidentiary hearings continued at Board Matter Number 140 and, to date, have produced 13 days of hearings, 13 witnesses for the Board, 16 witnesses for respondent, 45 exhibits for the Board, 41 exhibits for respondent, and 2037 pages of notes of testimony.

12. The last day of evidentiary hearings in Board Matter Number 140 was on September 14, 1988; recess was declared by the hearing committee and hearings were subsequently scheduled to recommence on October 5, 1988.

13. On October 3, 1988, the Board filed a pleading captioned "Amendment To Charges For Formal Proceedings" (hereinafter "Amended Charges") at Board Matter Number 140 setting forth three additional charges, III, IV and V, alleging that respondent violated Canons 1, 2 and 3A(4) by engaging in *ex parte* communications with Judge Emil Narick, then of the Court of Common Pleas of Allegheny County in 1984, 1985 and 1986 concerning certain named and unnamed cases pending in his court.

14. Counsel for respondent received these so-called "Amended Charges" by hand-delivery in his office late in the day on October 3, 1988, and respondent received a copy of these charges by express mail delivered to his office on October 4, 1988.

15. Neither respondent nor counsel had been previously notified of, or were in any way aware of, an investigation into respondent's conduct in re Judge Narick.

16. The so-called "Amended Charges" of October 3, 1988, were signed by Mr. Robert L. Keuch, Esquire, and were accompanied by a letter of Mr. Keuch which stated as follows:

> Enclosed are Amended Charges to the Formal Charges that were previously served upon you.
>
> *These charges* are based upon information and evidence very recently obtained during our investigation into these matters and *are served upon you pursuant to Rule 8 of the Board's Rules of Procedure*.
>
> *Pursuant to Rule 8, an answer to these amended charges shall be filed on or before October 7, 1988.* (Emphasis supplied).
>
> [(End of letter)
> (Signature of Mr. Keuch)]

17. Rule 9 provides:

> AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

18. By Mr. Keuch's letter of October 3, 1988, the Board and Board Counsel set a time of three days from date of service upon respondent within which to file a written answer to the

so-called "Amended Charges."

19. On October 5, 1988, a telephone conference was held before the hearing committee at Board Matter Number 140 (Judge Munley, and Messrs. Higgins and Hoyle) at which counsel for respondent strenuously objected to the filing of the so-called "Amended Charges" and the consolidation of said Charges III, IV and V with original Charges I and II on various grounds, including: that the so-called "Amended Charges" were not Amendments permissible under Rule 8, but rather were entirely new charges which did not arise out of the proceedings at Board Matter Number 140 in any way; that these charges should therefore have been filed, if at all, as Rule 2 charges, preceded and accompanied by all of the procedural mechanisms and safeguards required by Rules 1-4; that the three days given respondent to prepare and file an answer to said charges was manifestly *per se* unreasonable, and rendered more manifestly unreasonable in light of the facts that the charges are vague and factually deficient, would require extensive investigation and preparation by counsel for respondent and because respondent and counsel live across the Commonwealth from each other and were both in the midst of intensive preparation for the October 5, 1988 scheduled hearings on Board Matter Number 140; and that the October 3, 1988 orders of the Board and Board Counsel were null and void because, inter alia, they were not adopted by a majority of the members of the Board as required by the Pennsylvania Constitution, Article V, section 18(b), the Consolidated Statutes, 42 Pa.C.S. § 2103 and Board Rules 14.

20. A review of the so-called "Amended Charges" and of the transcript of the telephone conference of October 5, 1988 discloses that said "Amended Charges" were: (a) not Amendments to the original charges at all, but were rather entirely new and unrelated charges; and (b) were added to the original Formal Charges by a vote of only three Board members, namely Mr. Bruce W. Kauffman, Esquire, Chairman, the Honorable Frank J. Montemuro, Jr., and Mrs. Antonia L. Scarlata.

21. It was agreed at the conclusion of the October 5, 1988 telephone conference to schedule a further telephone conference before the three members of the Board who participated

in the determination on the October 3, 1988 "Amended Charges" to resolve the issues: (1) Were the "Amended Charges" an Amendment to the Original Charges and Notice of the Institution of Formal Proceedings such that Rule 8 procedures would apply, or were they entirely new and unrelated charges such that Rule 2 procedures (and Rule 1-4 procedures) would apply; and (2) if determined to be Rule 8 "Amendments To Notice," what would be a "reasonable time both to answer the amendment and to prepare and present" a defense thereto as required by Rule 8.

22. Following the telephone conference on October 5, 1988, Mr. Keuch gave assurances to respondent and to counsel for respondent that the time for preparing and filing an answer to the so-called "Amended Charges" would be tolled or suspended pending resolution of the above issues and objections raised by respondent.

23. On October 6, 1988, a telephone conference was held before Mr. Kauffman, Judge Montemuro and Mrs. Scarlata at which time counsel for respondent renewed and preserved his various objections to the so-called "Amended Charges" and requested the participation of the entire Board, including the three members of the hearing committee at Board Matter Number 140 and the two Board members who had recused themselves from participation in the pending proceedings at Number 140 (i.e., Judges Rowley and Ross).

24. At the conclusion of the October 6, 1988 telephone conference, the participating Board members agreed to convene the Board En Banc for resolution of the various legal issues and objections regarding the so-called "Amended Charges" of October 3, 1988, and oral argument was scheduled in Philadelphia for October 10, 1988; it was further agreed that Judges Rowley and Ross would be requested to participate in this En Banc session and determination.

25. Counsel for respondent took the position that the factual averments of the so-called "Amended Charges" would not have to be presented to the En Banc panel in order to reach a determination as to the legal issues and objections raised, and that said factual averments should not be presented to the En Banc panel in order to avoid further pollution of the hearing committee (Judge Munley, and Messrs. Higgins and Hoyle)

beyond that which had already occurred when that committee was apprised that "Amended Charges" had been filed against respondent.

26. On October 10, 1988, oral argument was held before an En Banc panel of the Board consisting of Mr. Kauffman, Judge Montemuro, Judge Munley, Mr. Higgins, Mr. Hoyle, and Mrs. Scarlata; Judges Rowley and Ross declined respondent's request to participate in this determination of the legal issues and various objections to the so-called "Amended Charges" and their impact upon the pending proceeding at Board Matter Number 140; the factual averments of the so-called "Amended Charges" were not presented to this En Banc panel during this proceeding of October 10, 1988.

27. The following day, October 11, 1988, the six member panel of the Board issued the following order:

> AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:
>
> 1) The charges filed on October 3, 1988 shall be *deemed to have been filed pursuant to* Judicial Inquiry and Review Board *Rule of Procedure 2 rather than* Judicial Inquiry and Review Board *Rule of Procedure 8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.*
>
> 2) The October 3, 1988 charges were correctly and properly issued.
>
> 3) *In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard ab initio by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.* (Emphasis added).

28. Respondent received a copy of the October 11, 1988 order "deeming" the previously-called "Amended Charges" to have been Rule 2 charges (despite the failure to comply with the mandated Rule 1 procedures which must, by Supreme Court Rule, precede a Rule 2 Notice of Formal Proceedings) on October 12, 1988 by express mail delivery to his office (which service was defective under Rule 2(c)).

29. Respondent now files this Omnibus Supplemental Application supplementing counsel's letter of October 13, 1988 (attached hereto as Exhibit A), in the nature of various pretrial motions and objections to the extraordinary order of October 11, 1988 establishing the contemplated unheard of En Banc hearing *ab initio* before six members of the Board, aborting all of the prior proceedings, and violating numerous procedural and substantive rights of respondent provided by the Constitutions of the United States and of this Commonwealth, the Consolidated Statutes of this Commonwealth, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness and fair play.

I. APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V

A. Violation of Supreme Court Rules of Procedure

30. As explicitly demonstrated by the so-called "Amended Charges" of October 3, 1988 themselves, by the accompanying letter of Mr. Keuch, and by the transcripts of the proceedings of October 5, 6 and 10, 1988, the "Amended Charges" were filed and served upon respondent "pursuant to Rule 8 of the Board's Rules of Procedure."

31. Despite this explicit (and erroneous) reliance upon Rule 8 as the mechanism for filing the "Amended Charges," the Board's order of October 11, 1988 "deems" the Rule 8 Charges to have been filed as Rule 2 Charges that were "correctly and properly issued." (Hereinafter, Charges III, IV and V that were created by the actions of six members of the Board on October 11, 1988 will be referred to as "Reapproved Charges.")

32. The record does not support the conclusion that "The

October 3, 1988 charges were correctly and properly issued;" to the contrary, the record of the proceedings and documents unequivocally demonstrates that the Board's "Amended Charges" and/or "Reapproved Charges" of October 3 and/or 11, 1988 failed to comply with the Supreme Court's mandated procedures of Rules 1 and 2 that are prerequisites for the filing of a Notice of Formal Proceedings and Formal Charges under Rule 2.

33. The applicable Rules provide, in relevant portions:

Rule 1. PRELIMINARY INVESTIGATION

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded or frivolous . . . shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. . . .

(b) If, after preliminary investigation, it is felt the complaint warrants further investigation, *the judge shall be notified* of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Board's own motion, *and shall be afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail* addressed to the judge at his chambers. . . .

Rule 2. NOTICE OF FORMAL PROCEEDINGS

(a) After the investigation has been completed, if *the Board* concludes that formal proceedings should be instituted, *the Board shall* without delay issue a written notice to the judge . . .

(b) The notice *shall specify in ordinary and concise language* the charges . . . and the alleged facts upon which such charges are based, and *shall advise*

the judge of his right to file a written answer to the charges against him within twenty (20) days after service upon him.

(c) The notice *shall be served* upon the judge by mailing, *by prepaid registered or certified mail*, a copy of the notice . . .

RULE 23. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Board" means the Judicial Inquiry and Review Board.

(e) *"Shall" is mandatory* and "may" is permissive.

34. On the record, it is undisputed that respondent was never notified prior to October 4, 1988 of any investigation against him in re Judge Emil Narick and was never "afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the Board prior to its determination of "whether formal proceedings should be instituted and a hearing should be held," as mandated by Rule 1(a) and (b).

35. To the contrary, the determination to institute formal proceedings regarding Judge Narick's apparent allegations and to hold a hearing was a fait accompli when respondent received defective notice of same (i.e., by express mail rather than by registered or certified mail) in his chambers on October 4, 1988.

36. Under the mandatory requirements of Rule 1(a) and (b) and Rule 2 adopted by the Pennsylvania Supreme Court, respondent is absolutely entitled to proper notice and a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the entire Board before the Board may make its determination that formal proceedings should be instituted by a Rule 2 Notice of Formal Proceedings and Formal Charges.

WHEREFORE, the failure of both the three member En Banc panel and the six member En Banc panel of the Board to comply with the Supreme Court's Rules of Procedure, namely Rules 1(a), (b) and 2(a), has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth; Charges III, IV and V should, therefore, be quashed.

B. Composition of Judicial Inquiry and Review Board

37. Article V, section 18 of the Pennsylvania Constitution provides, in relevant portion, as follows:

> Suspension, removal, discipline and compulsory retirement
>
> (a) There *shall be a Judicial Inquiry and Review Board having nine members as follows*: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. *A vacancy on the board shall be filled by the respective appointing authority for the balance of the term*. The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board *shall act only with the concurrence of a majority of its members*. (emphasis added)

See also 42 Pa.C.S.A. § 2101-03 (implementing and paralleling Article V, section 18).

38. The composition of the Judicial Inquiry and Review Board, established by the Constitution and implemented by the Consolidated Statute, represents an exact and a delicate balance of Superior Court and Common Pleas Court judges, lawyers and laypersons, and explicitly contemplates the full complement of nine members in taking actions, issuing orders and making decisions, since the respective appointing authority at all times is required to fill any vacancy for the remainder of the vacant term of office.

39. It has been admitted throughout these proceedings by Board Counsel and various Board members that there are inherent and inevitable due process dangers of commingling of prosecutorial and adjudicatory functions of the Board, dangers clearly illustrated by the *ex parte* injection by Mr. Keuch of the extraneous and prejudicial "Kenneth Ross" matter into these proceedings. *See* Notes of Testimony, September 12, 1988 at 1204-14, and September 13, 1988 at 1441-96.

40. The constitutional and statutory composition of the Board, consisting of a majority of judges who are professionally trained to and experienced in remaining impartial in judicial proceedings, is one of the safeguards of the Article V, section 18 Judicial Inquiry and Review Board system that could possibly mitigate the dangers recognized and caused by the commingling of prosecutorial and adjudicatory functions.

41. The "Amended Charges" of October 3, 1988 were initially approved and filed by three members of the Board only, consisting of one Superior Court judge, one lawyer and one layperson, and the "Reapproved Charges" of October 11, 1988 were approved by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons.

42. Because Board Counsel chose to inject and mix these entirely distinct and separate charges into the pending proceedings at Board Matter 140 against respondent, Judges Rowley and Ross, material witnesses in Board Matter 140, declined to participate in the determination to institute formal proceedings as to the "Amended Charges" of October 3, 1988, and declined to participate in the October 10, 1988 oral

argument; as noted, Judge Bonavitacola has already resigned as a member of the Board and his office remains vacant.

43. Thus, the delicate mechanism established by Article V, section 18 has been dismantled (i.e., at times three fifths of the judicial members of the Board have not participated in the actions and decisions rendered by "the Board," and at times fully one-third to two-thirds of the entire Board have not participated in the actions and decisions rendered by "the Board"), and determinations detrimental to respondent (i.e., the October 3 and II, 1988 actions and orders) have been made by unconstitutional and illegal panels of the Board.

WHEREFORE, it is submitted that the actions, orders and determinations of October 3 and 11, 1988 rendered by constitutionally and statutorily deficient panels of the Board have deprived respondent of due process and equal protection of law and of the safeguards and protections mandated by the Constitution and Consolidated Statutes mandating the composition of the Board; Charges III, IV and V should, therefore, be quashed.

II. APPLICATION FOR STAY OF PROCEEDINGS OR DISMISSAL

A. Breach of Confidentiality of Proceedings

44. Throughout these proceedings, as demonstrated by testimony and exhibits throughout the record, there have been monumental and continual leaks of confidential information arising within these proceedings, which information has led to numerous inflammatory, prejudicial and highly selective articles being published in the Pittsburgh Post-Gazette and the Philadelphia Inquirer. *See, e.g.* articles of October 8, 1988, attached hereto as Exhibits B and C, and Notes of Testimony, September 14, 1988 at 1660-1701 and Respondent's Exhibits 40A-C.

45. On October 7, 1988, on a television program on WQEX in Pittsburgh wherein Pittsburgh Post-Gazette reporters and editors comment upon newspaper articles and stories, reporter Bill Moushey discussed his upcoming article of October 8, 1988 ("Narick tells of Larsen conduct.") and responded to a

question concerning new Larsen charges filed by the Board with reference to "my (Moushey's) sources on the Board" or words to that effect.

46. Neither respondent nor counsel for respondent have given or leaked any confidential information concerning these proceedings to any member of the media.

47. It is obvious, therefore, that confidential information has been leaked and continues to be leaked to reporters Bill Moushey and/or Dan Biddle of the Philadelphia Inquirer by sources within the Board.

WHEREFORE, it is respectfully requested that all proceedings at Board Matter 140 be dismissed because of the blatant and serious breach of the confidentiality of these proceedings which has irreparably harmed respondent and prejudiced him and has hampered his defense of the charges against him; alternatively, respondent requests these proceedings be stayed pending an evidentiary hearing to determine the source of the leaking of confidential information to the media in violation of the confidentiality of the proceedings mandated by the Constitution.

B. Composition of Judicial Inquiry and Review Board

48. As set forth in the preceding section, the actions of the six member En Banc panel of the Board, and the contemplated hearings *ab initio* before those six members, violate and will violate the constitutional and statutorily mandated composition of the Board.

49. The vacancy created by the resignation of Judge Bonavitacola, whose term of office would have expired on January 1, 1989, has not been filled by the Supreme Court.

50. Additionally, the recusal of Judges Rowley and Ross from all legal and factual matters involving respondent at Board Matter Number 140 has resulted in the *de facto* vacancy, for all practical effects and purposes, of those two judge members of the Board in this matter.

51. Judge Rowley's term of office on the Board expires on December 3, 1988; Judge Ross' term of office on the Board expires on January 1, 1989.

WHEREFORE, as respondent has been and will be deprived of his constitutional and statutory rights to be judged by a full nine member Judicial Inquiry and Review Board consisting of two judges of the Superior Court, three judges of the Courts of Common Pleas, two lawyers and two laypersons, and has been therefore denied due process and equal protection of the laws, respondent requests the remaining participating members of the Board to stay all further proceedings in this matter pending application by the Board to the Supreme Court for the appointment of the appropriate judges to fill the vacancies of Judges Bonavitacola, Rowley and Ross or until after the Supreme Court fills all three said vacancies in due course after expiration of the respective terms of office.

III. APPLICATION TO SEVER CHARGES

A. Charges III, IV and V

52. It is clear that the "Amended/Reapproved Charges" III, IV and V could not be filed as Rule 8 amendments to the pending proceedings at Board Matter Number 140 because said charges did "not conform to proof or . . . set forth additional facts" developed at said proceedings.

53. Charges III, IV and V concern allegations made by Judge Narick of unrelated and completely separate *ex parte* communications alleged to have been made by respondent from 1984-1986 allegedly involving separate and distinct parties, dates and cases.

54. Judicial Inquiry and Review Board Proceedings have been determined to be quasi-criminal proceedings. *Matter of Dandridge*, 462 Pa. 67, 74, 337 A.2d 885, 888 (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, 745, 758 (1979).

55. As Judge Munley has stated, the quasi-criminal nature of the instant proceedings "would raise the plethora or the umbrella of all of the protection that would flow to a person in a criminal setting." Notes of Testimony, October 5, 1988 at 1728. *See also* concurring and dissenting opinion of Justice McDermott in *Judicial Inquiry and Review Board v. Snyder*, ____ Pa. ____, 523 A.2d 294, 300-01 (1987) ("The removal of a duly elected judicial officer is a matter of the gravest possible

concern. The exercise of such power must be rounded *at the very least*, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.")

56. The Pennsylvania Rules of Criminal Procedure provide:

> RULE 229. AMENDMENT OF INFORMATION
>
> The court may allow an information to be amended when there is a defect in form, the description of the offense, the description of any person or any property, or the date charged, *provided the information as amended does not charge an additional or different offense.* Upon amendment the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

57. As a quasi-criminal prosecution, the addition of "Amended Charges" III, IV and V to Board Matter 140's Notice of Institution of Formal Proceedings are absolutely prohibited by Pa. Crim. Pro. Rule 229 and caselaw applying Rule 229. *See, e.g., Commonwealth v. Shirey*, 333 Pa. Super. 85, 481 A.2d 1314 (1984), appeal after remand, 343 Pa. Super. 189, 494 A.2d 420 (1985); *Commonwealth v. Gray*, 329 Pa. Super. 347, 478 A.2d 822 (1984).

58. Even in a civil proceeding joinder of entirely new and unrelated causes of action with the original causes of action at this stage of the proceedings would be prohibited and prejudicial. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *see* Pa. R.Civ.Pro. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) and *Lohmiller v. Weidenbaugh*, 302 Pa.Super. 174, 448 A.2d 583 (1982), rev'd on other grounds, 503 Pa. 329, 469 A.2d 578 (1983).

59. The United States Supreme Court has declared that a respondent to a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the respondent are added during disciplinary proceedings based on evidence adduced at said proceedings. *In Re Ruffalo*, 390 U.S. 544 (1968); *a fortiori* charges added to and during a pending

proceeding based upon investigations totally extraneous to the proceeding would deprive the respondent of fair notice and due process per *Ruffalo*.

60. The United States Supreme Court stated in *Ruffalo*, 390 U.S. at 551:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 US 1, 33, 18 Led 2d 527, 549, 87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

61. Likewise in the instant proceedings, the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, etc.) could have been and would have been substantially altered had Charges III, IV and V been filed prior to the commencement of this complicated and lengthy proceeding, so that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.*

62. *See also Judicial Inquiry and Review Board v. Fink*, 516 Pa. 208, 532 A.2d 358, 361 (1987). ("We do not address or consider the Board's findings that Respondent attempted to deceive the Board concerning the proffered testimony of the 'mystery witness' because those findings do not concern formal charges made against the Respondent. If the Board wishes to initiate action against the parties involved in the 'mystery witness' episode, *then formal proceedings should be commenced, those charged should be notified of the charges against them, and they should be given an opportunity to prepare a defense and respond to the charges*. For purposes of the adjudication of this case, the 'mystery witness' matter

has no bearing and forms no part of our consideration or rationale.")

63. As noted in paragraph 11 herein, substantial time, energy, financial expense and legal and judicial resources have been expended in defending Charges I and II at Board Matter Number 140, and the respondent's defense was approaching completion.

64. Respondent's defense presentation and strategy has at all times been designed and molded to conform to the original Charges I and II as to which he had been noticed and responded pursuant to Article V, section 18 and the Rules of Procedure Governing The Board.

WHEREFORE, it is submitted that it is manifestly unfair and is a denial of due process, and equal protection, the analogous rules of criminal procedure and fundamental notions of fair play to consolidate Charges III, IV and V with Charges I and II at Board Matter 140, and respondent requests severance of Charges III, IV and V not only from original Charges I and II, but also severance of each Charge III, IV and V to be separately noticed and heard in separate proceedings before the Board following disposition of Charges I and II in Board Matter 140.

B. Charges I and II

65. Original Charges I and II concern allegations and averments of unrelated and completely separate and distinct events and matters which should not be consolidated in a single proceeding as required by the En Banc six member panel's order of October 11, 1988.

WHEREFORE, upon commencement of new hearings *ab initio* of said Charges I and II as contemplated by the order of October 11, 1988, Formal Proceedings regarding said charges should be also severed and prosecuted in separate proceedings.

IV. APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERNATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS

66. The "Reapproved Charges" are insufficient and fail to "specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based," specifically:

(a) Charge III gives no docket number or other citation to *Mercede Center, Inc. v. Equibank, Cook and Caribank* nor does it specify the relevant time frame;

(b) Charge IV gives no case name, no docket number or other citation to "a zoning case involving a business entity named *McDermott Land Company*," nor does it specify the relevant time frame;

(c) Charge V is totally lacking in factual averments in that it fails to identify any relevant time frame for the alleged improper *ex parte* communications regarding "certain tax appeal cases" being "handled by Attorney Leonard Mendelson" other than "at some point" after 1984, and gives neither case names, and no docket numbers, or other citations, nor the names of "particular judges" alleged.

67. Due to the lack of specificity and conciseness in said Charges III, IV and V it is impossible to prepare an intelligent responsive answer to said vague and non-specific charges which are constitutionally deficient in failing to provide adequate notice of the charges against respondent.

WHEREFORE, respondent requests dismissal of Charges III, IV and V for failure to specify the charges and the alleged facts upon which they are based; and in the event said charges are not dismissed, respondent requests more specific charges or for a pleading in the nature of a bill of particulars.

V. APPLICATION TO DISMISS ORIGINAL CHARGES I AND II ON GROUNDS OF DOUBLE JEOPARDY

68. As set forth in paragraph 11 herein, respondent has expended considerable time, energy and personal and financial resources in his defense to the original Charges I and II as to which he received the requisite Notice of Formal Proceedings at Board Matter Number 140.

69. The order of the six member panel of the Board of October 11, 1988 "directs the panel currently hearing Board Matter 140 to suspend hearings on that matter."

70. That order further states that: "3. In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

71. Thus, the order of October 11, 1988 *sua sponte* aborts the proceedings at Board Matter Number 140 (in effect, declares a "mistrial") without cause of a necessitous and compelling nature, and compels respondent to stand trial anew despite the time, energy and personal and financial resources he has been forced to expend to date to defend against Charges I and II.

72. It is submitted that respondent was and is prevailing on the merits of Charges I and II, and that the extraordinary, unprecedented and unheard of procedure (never in the history of the Board has a hearing committee of more than three members of the Board been convened) directed by the six member panel of the Board on October 11, 1988 was designed to attempt to ensure the participation of Chairman Kauffman to vote on all of these proceedings (i.e., Counts I-V), based upon the following averments and inferences:

(a) Chairman Kauffman's term of office on the Board will expire on November 15, 1988;

(b) Chairman Kauffman has been asked by respondent to recuse himself from these proceedings due to his demonstrable personal bias, hostility and animosity toward respondent and his "unalterable personal view that Justice Larsen had to be removed from the bench" (*see* affidavit of Richard A. Sprague, Esquire, attached hereto as Exhibit D);

(c) Chairman Kauffman would be relieved of his duties on November 15, 1988 and he would have no further official or authorized participation in the deliberations and determination of these proceedings against respondent, unless he were a member of a hearing committee participating in "any hearing in progress at the end of his term;" *see* Article V, section 18(b); 42 Pa.C.S.A. § 2102(b);

(d) The order of October 11, 1988 "deeming" its void, invalid and unconstitutional action of October 3, 1988 effective as of October 3, 1988 and retroactively setting a time to answer the "deemed" Rule 2 "Reapproved Charges" III, IV

and V by October 24, 1988 (i.e., twenty days from October 3, 1988), allows the Board to set a hearing date on the now "consolidated" charges on or before November 15, 1988 since Rule 4 requires the Board to "give notice of such hearing. . . at least twenty (20) days prior to the date set," but only after the twenty day period within which to file an answer to formal charges has elapsed;

(e) As noted previously, the order of October 11, 1988 "deeming" pseudo-life into the void, invalid and unconstitutional previously-called "Rule 8 Amended Charges," and retroactively "deeming" said charges to have been "correctly and properly issued," deprives respondent of the full time mandated by the Rules and by due process and equal protection by depriving him of the full twenty days required by Rule 2(b) and of the additional time required by Rule 1(b) ("reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose"); the twenty days to file a written answer to charges provided by Rule 2(b) should thus run from October 12, 1988 (date of defective service), and thus November 1, 1988 should have been the absolute minimum time set by the order of October 11, 1988 within which to file a written answer;

(f) Moreover, the order of October 11, 1988 deprives respondent of the time provided by the explicit assurances made by Mr. Keuch on October 5, 1988 that the time for filing a written answer to Charges III, IV and V would be tolled or suspended pending disposition of respondent's objections to said charges;

(g) The illegal and unconstitutional actions and timing discussed in sub-paragraphs (d-f) is designed and intended to "lock-in" Chairman Kauffman to further participate in this matter after the expiration of his term, and further to give Board Counsel a "second bite at the apple" since it was not prevailing on the merits of Charges I and II.

WHEREFORE, it is submitted that the unique, bizarre and unheard of procedure ordered by the six member panel of the Board on October 11, 1988 violates respondent's state and federal constitutional rights not to be twice placed in jeopardy of punishment and prosecution, violates his state and federal constitutional rights to due process and equal protection of

law and to fundamental fairness, deprives respondent of any semblance of fair play and exacerbates the appearance of impropriety that has permeated this proceeding from its inception (*see, e.g.* Respondent's Application For Disqualification of All Board Members which has been incorporated herein by reference and Respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings filed in the Supreme Court of Pennsylvania on July 29, 1988, which Applications and Responses are also incorporated herein by reference); it is respectfully requested, therefore, that Charges I and II be dismissed with prejudice if the order of October 11, 1988 is executed.

VI. APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROSECUTORIAL MISCONDUCT

73. On or about June 15, 1988, respondent filed the aforementioned and incorporated Application for Disqualification of All Members of the Judicial Inquiry and Review Board alleging, inter alia, that:

> participation in this matter against respondent by the current members of the Board, individually and collectively, has deprived and will continue to deprive respondent of his due process right to a fair hearing before a fair and impartial tribunal and of his civil and constitutional rights under the Constitution of the United States, the Pennsylvania Constitution, and applicable federal and state statutes. . .

74. On June 29, 1988. said Application for Disqualification was denied by "eight members of the Board, excluding Judge Ross," and the Order Denying Application For Disqualification was executed by "Robert L. Keuch, Executive Director and General Counsel."

75. On July 27, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the aforementioned and incorporated Applications for Writ of Prohibition, Extraordinary Relief, and Stay of Judicial Inquiry and Review Board Proceedings alleging, inter alia, that the makeup and composition of

the Board necessarily and improperly results in excessive commingling of prosecutorial and adjudicatory functions including the wearing of "two hats," as prosecutor and adjudicator, by the Executive Director of the Board and its General Counsel, Mr. Keuch.

76. As previously noted, Mr. Keuch has signed orders for and by the Board on numerous occasions, including the granting of a continuance on July 5, 1988; the denying of respondent's Application for Disqualification; the filing of the so-called "Amended Charges" on October 3, 1988; and the setting of a time period of only three days within which to answer said charges. (Relevant documents and letters are attached hereto as Exhibits E-H); thus Board Counsel, the prosecutor for the Board, repeatedly operates in a judicial capacity and performs adjudicative functions.

77. As set forth in paragraph 39 herein and in the Notes of Testimony for September 12-13, 1988 at 1204-14, 1441-96, respondent has been seriously prejudiced in this matter by the presentation by Mr. Keuch of a highly inflammatory, irrelevant extraneous matter to the eight sitting members of the Board, including the three member hearing committee, in the middle of the proceedings at Board Matter Number 140.

78. As demonstrated by these incidents and events, the commingling of prosecutorial and adjudicatory functions, and the constitutional shortcomings inherent in the current Judicial Inquiry and Review Board system have been magnified and exaggerated throughout these proceedings by the unique circumstances of this case peculiar to respondent, to his severe prejudice.

79. As Mr. Keuch stated on October 10, 1988, the "most important reason" for the existence of the Judicial Inquiry and Review Board and the procedures mandated by the Constitution, the Consolidated Statutes, and Board Rules "is to protect the integrity of the judicial system." Notes of Testimony, October 10, 1988 at 76.

80. To date in the proceedings at Board Matter Number 140 (ostensibly designed "to protect the integrity of the judicial system") we have witnessed the following: a sudden "rush to judgment" and hastily scheduled hearings after more than a year of Board investigation; sworn allegations of attempts to

suborn perjury, obstruct justice and coerce witnesses, *see* affidavit of Nikolai Zdrale attached as Exhibit I, with no investigation or efforts by the Board to determine the validity of said allegations or referral to law enforcement agencies; continual and extensive commingling of prosecutorial and adjudicatory functions far beyond those inherent and inevitable in the Judicial Inquiry and Review Board system itself; several discovery violations of "*Jencks*" and "*Brady*" requirements and the rules of fair play; the unnecessary, bad faith introduction of highly prejudicial, irrelevant matter polluting the proceedings beyond repair; one judge member of the Board, designated as Chairman of the hearing committee in this proceeding, inexplicably resigning his office six days before hearings were scheduled to commence, with no replacement forthcoming to fill the vacancy; two judge members of the Board recusing themselves in all matters involving respondent because they are material witnesses as to Charge I only whose testimony flatly contradicts each other's on a key issue of credibility; continual, massive, detailed leaking of confidential information which can only come from the Post-Gazette's and Inquirer's "sources on the Board" without any attempt (such as evidentiary hearings) to discover the source and plug the leak; and now, finally, this extraordinary, unprecedented and unheard of procedure whereby three members of the Board (including Chairman Kauffman who has previously stated he would do everything in his power to have respondent removed from the bench) file vague "Rule 8 Amended Charges" over Mr. Keuch's signature, and thereafter employ the disingenuous legal fiction of "deeming" said charges to have been "Rule 2 charges" even though Rule 2 procedures have been utterly ignored, and setting an illegal and constitutionally deficient period of time within which to file a written answer in order to ensure Chairman Kauffman's continued participation in these proceedings by aborting the extensive proceedings that have already caused enormous expenditures of time, energy, and personal and financial resources to respondent and were proceeding favorably to him, and ordering hearings on consolidated charges *ab initio* before a six member panel of the Board, the first time in history that more than three members of the Board have participated on a hearing committee.

81. Rather than protecting the integrity of the judicial system, the instant proceedings have become a travesty of justice and have deprived and continue to deprive respondent of significant procedural and substantive rights derived from the State and Federal Constitutions, the Pennsylvania Consolidated Statutes, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, fair play and justice.

WHEREFORE, for all of the foregoing reasons, respondent requests the Judicial Inquiry and Review Board to dismiss all Charges against respondent, with prejudice, on the basis of excessive and impermissible commingling of prosecutorial and adjudicatory functions, prosecutorial misconduct, overreaching and bad faith.

VII. APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/REAPPROVED CHARGES" III, IV AND V

82. As previously set forth in paragraphs 19 and 37-38, the Board can act "only with the concurrence of a majority of its members" and its members "shall consist of" two Superior Court judges, three Common Pleas judges from different judicial districts, two lawyers and two laypersons. Article V, section 18(a) and (b) of the Pennsylvania Constitution; 42 Pa. C.S.A. sections 2102-03.

83. It is undisputed that the order of October 3, 1988 erroneously purporting to be an "Amendment" to the Formal Charges "pursuant to Rule 8," and attempting to add Charges III, IV and V to Board Matter 140 as "Amended Charges," was acted upon by only three members of the Board consisting of one Superior Court judge, one lawyer and one layperson.

84. Accordingly, the October 3, 1988 action and "Amended Charges" of the Board are unconstitutional, illegal and null and void, and are of no legal effect whatsoever.

85. As set forth more fully in the preceding sections, the order of October 11, 1988 "deeming" the October 3, 1988 "Amended Charges" to have been "correctly and improperly" issued is also unconstitutional, invalid and null and void, as said order of October 11, 1988 violates the state and federal

constitutional requirements of due process of law, the state constitutional and statutory requirements regarding the composition of the Board, and the Rules of Procedure Governing the Judicial Inquiry and Review Board.

86. As set forth more fully in the preceding sections, if the order of October 11, 1988 is upheld by the Board over respondent's objections, then the time set therein for respondent to file a written answer on or before October 24, 1988 to Charges III, IV and V, is manifestly unreasonable, illegal and unconstitutional, for the following reasons:

(a) The order of October 11, 1988 resurrects the eight day period between October 3, 1988 and October 11, 1988, even though the October 3, 1988 "Amended Charges" were and are null and void and of no legal effect whatsoever, and retroactively and illegally posits that eight day period into the twenty day period required by Rule 2(b) within which respondent may file a written answer;

(b) The eight day period between October 3-11, 1988 was consummed by respondent and by counsel for respondent in preparation for and participation in the conferences on October 5, 8 and 10, 1988;

(c) The order of October 11, 1988 ignores and retroactively takes-back the assurances given to respondent and his counsel by Mr. Keuch that the time for filing an answer to the October 3, 1988 Charges III, IV and V would be tolled and suspended pending disposition of respondent's objections and the legal issues concerning same, which resolution (illegal and invalid) did not take place until October 11, 1988.

(d) The order of October 11, 1988 "deeming" the "Amended Charges" of October 3, 1988 to have been "correctly and properly issued" as of October 3 1988 deprives respondent of the additional time allotted and required by Rule 1(b) to afford respondent a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" before the Board may file a Notice of Institution of Formal Proceedings;

(e) The vagueness and lack of specificity of the "Amended/Reapproved Charges" III, IV and V renders it impossible to file an intelligent response to said charges, and requires extensive and intensive research and investigation

merely to determine what cases, times, dates, judges and proceedings to which these nebulous charges refer;

(f) The time necessary and appropriate for the filing of the instant Supplemental Omnibus Application challenging the validity of the October 11, 1988 "Reapproved Charges" and the time which elapses pending disposition of said Application cannot be counted against respondent regarding the twenty days required by Rule 2(b) within which to file a written answer to said charges, *see* Pa. R.Civ.Pro.Rule 1028(d) ("If the preliminary objections are overruled, the objecting party shall have *the right to plead over* within twenty (20) days after notice of the order or within such other time as the court shall fix.");

(g) Additionally, whereas respondent, a member of the Pennsylvania Supreme Court, and his counsel had May-August, 1988, the relatively "slow" summer period for the Court, to prepare an answer and defense to the original Charges I and II, the Court is currently enmeshed in the heart of its "busy" season, having just completed oral arguments and opinion assignments on September 26-30, 1988 in Pittsburgh, and with oral arguments/opinion assignments scheduled in Philadelphia on October 24-28, 1988, December 5-9, 1988, and January 17-20, 1988.

WHEREFORE, in the event that the Board denies respondent's requests for relief set forth herein and upholds the validity of its order of October 11, 1988 over objections, respondent requests an extension of time, at least until February 1, 1989, as of right to file written answer to the "Reapproved Charges" III, IV and V.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

BEFORE ME, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing SUPPLEMENTAL OMNIBUS APPLICATION are true and correct to the best of his information, knowledge, and belief.

ROLF LARSEN

Rolf Larsen

Sworn to and subscribed
before me this 19th day
of October, 1988.

BERNADETTE M. SEIBERT

Notary Public

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

ORDER DENYING APPLICATION FOR DISQUALIFICATION

And now, the 29th day of June, 1988, eight members of the Board, excluding Judge Ross, who has been and is excluded from all Board proceedings in this matter, individually and collectively deny Respondent's APPLICATION FOR DISQUALIFICATION OF ALL MEMBERS OF THE JUDICIAL INQUIRY AND REVIEW BOARD requesting that each and every member of the Board disqualify his or her self from further participation in this matter.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

ORDER GRANTING CONTINUANCE

Pursuant to Rule 12 of the Board's Rules of Procedure and in response to Respondent's counsel's letter dated June 24, 1988, which counsel has requested be considered a motion for a continuance, the hearing in this matter scheduled for July 19, 1988 is continued until August 22, 1988 at 9:30 A.M.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

JULY 5, 1988

July 5, 1988

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
The Honorable Alex Bonavitacola
James H. Higgins
Lawrence T. Hoyle, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN RE:
The Honorable Rolf Larsen

Board Matter Number 140

NOTICE OF HEARING
(J.I.R.B.R.P. 4)

And now, the 24th day of October, 1988, notice is hereby given to all interested parties that a hearing pursuant to J.I.R.B.R.P.5 shall be held on Monday, November 14, 1988, beginning at 10:00 A.M. in Commonwealth Court, Courtroom Number One, Fifth Floor, South Office Building, Harrisburg, Pennsylvania.

For the Judicial Inquiry and
Review Board

ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James M. Munley
Mr. James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Mrs. Antonia L. Scarlata

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief. Failure to file such a written response (answer) to said averments set forth in said Applications shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF

1. Justice Rolf Larsen is the respondent at Judicial Inquiry and Review Board Matter 140.

2. On May 24, 1988, following over one year of preliminary investigation and notice to respondent mandated by Rule 1 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (hereinafter Rules), and after consideration of respondent's response to the Board's inquiries, the Board filed a Notice of Institution of Formal Proceedings against respondent charging him with two counts of allegedly improper conduct.

3. These two charges alleged, in essence: Charge I - that respondent violated Canons 1, 2 and 3A(4) of the Code of

Judicial Conduct by engaging in an *ex parte* communication with Judge Eunice Ross, a member of this Board, regarding a matter involving attorneys Robert O. Lampl and James Ashton, the latter of whom had a personal relationship with respondent and handled a real estate transaction wherein respondent purchased "approximately 38 acres of land in Fairfield Township, Westmoreland County" from Nikolai Zdrale; Charge II - that respondent violated Canons 1 and 2 "by his conduct in pursuing an appeal of zoning variances granted" to real estate developer Frank DePlacido and in pursuing a financial settlement to withdraw his appeal.

4. Hearings on these charges were originally scheduled to commence on July 18, 1988.

5. Counsel for respondent strenuously opposed this hearing Schedule as a sudden "rush to judgment" after the Board took over a year to investigate and prepare its case, because it was an inconvenient time (summer vacation schedule) to interview witnesses and arrange for their appearances, because respondent's official duties as a member of the Pennsylvania Supreme Court at that time interfered with his ability to adequately prepare for a July 18, 1988 hearing, and because pretrial motions had yet to be disposed of, including respondent's Application for Disqualification of All Members of the Judicial Inquiry and Review Board, which Application was denied on June 29, 1988 by "eight members of the Board, excluding Judge Ross," over the signature of Mr. Robert L. Keuch, Executive Director and General Counsel of the Board.

6. A continuance was granted and hearings were scheduled to commence on August 22, 1988 before a three-member hearing committee consisting of the Honorable Alex Bonavitacola (designated Chairman of said committee), Mr. James H. Higgins, and Mr. Lawrence T. Hoyle, Jr., Esquire.

7. On July 29, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the following Applications: Application For Leave to File Original Process Pursuant to Pennsylvania Rules of Appellate Procedure, Rule 3307; Application for Writ of Prohibition and/or Application for Extraordinary Relief; Application for Stay of Judicial Inquiry and Review Board Proceedings Pending Disposition of Within Applications for Writ of Prohibition and for Extraordinary Relief; said

Applications were assigned JIRB Docket No. 138 by the prothonotary for the Eastern District, and are incorporated herein by reference along with the Board's Response thereto.

8. On August 12, 1988, the Pennsylvania Supreme Court denied the relief requested in said Applications by Per Curiam orders issued without opinion.

9. On August 16, 1988, citing personal reasons and expanded duties in connection with an organization of Pennsylvania judges, Judge Bonavitacola resigned from the Board some four and one-half months before his term of office would have naturally expired on January 1, 1989; the vacancy created by Judge Bonavitacola's sudden resignation has not been filled to date by the appointing body, the Pennsylvania Supreme Court.

10. Following requests by counsel for respondent for all "*Jencks*" (*Jencks v. United States*, 353 U.S. 657 (1957)) and "*Brady*" (*Brady v. Maryland*, 373 U.S. 83 (1963)) material in the possession of Board Counsel, and the Board Counsel's partial compliance with this request, hearings did, in fact, commence on August 22, 1988 in Harrisburg.

11. The Honorable James E. Rowley was designated as Chairman of the hearing committee, but recused himself on August 22, 1988 upon request when it became apparent (from certain "*Brady*" material belatedly turned over to counsel for respondent on the literal eve of trial) that Judge Rowley would become a material witness in this proceeding as he had rendered a statement exculpatory to respondent in his interview with Board investigators flatly contradicting Board witness Judge Ross' statements on certain critical points; (Judge Rowley has, in fact, become a material witness in these proceedings whose testimony flatly contradicts that of Judge Ross on certain critical points).

12. The Honorable James M. Munley was then appointed to and designated the Chairman of the hearing committee, and the evidentiary hearing commenced on August 23, 1988.

13. Evidentiary hearings continued at Board Matter Number 140 and, to date, have produced 13 days of hearings, 13 witnesses for the Board, 16 witnesses for respondent, 45 exhibits for the Board, 41 exhibits for respondent, and 2037 pages of notes of testimony.

14. The last day of evidentiary hearings in Board Matter Number 140 was on September 14, 1988; recess was declared by the hearing committee on that date.

15. Pursuant to discussions between Board Counsel Keuch, the members of the hearing committee, and counsel for respondent, an agreement as to the hearing schedule was established, and the hearings were to be held as follows: hearings were to recommence on Wednesday, October 5, 1988 with the remainder of respondent's defense, which was to be completed that week; on Monday, October 10, 1988, the members of the hearing committee were to make physical viewings of the properties in question regarding Charges I and II, and the remainder of that week was scheduled for rebuttal witnesses for the Board, if any, and surrebuttal witnesses for respondent, if any; the following week of October 17, 1988 was scheduled for any witnesses that the hearing committee would direct to appear and testify; it was expressly contemplated and agreed that the hearings at Board Matter Number 140 would be completed on or before October 21, 1988.

16. Board Counsel Keuch had been informed by counsel for respondent during said discussions regarding the hearing schedule that he, counsel for respondent, was representing a criminal defendant in a major federal trial scheduled to commence on October 24, 1988 in the United States District Court for the Eastern District of Pennyslvania, the Honorable James T. Giles presiding, which trial involves five defendants from New York, four other lawyers from New York, over 100 witnesses listed for trial by the federal prosecutors, and no possibility of continuances.

17. On October 3, 1988, "the Board" filed a pleading captioned "Amendment To Charges For Formal Proceedings" (hereinafter "Amended Charges," a copy of which is attached hereto as Exhibit A) at Board Matter Number 140 setting forth three additional charges, III, IV and V, vaguely alleging that respondent violated Canons 1, 2 and 3A(4) by engaging in *ex parte* communications with Judge Emil Narick, then of the Court of Common Pleas of Allegheny County in 1984, 1985 and 1986 concerning certain named and unnamed cases pending in his court.

18. Counsel for respondent received these so-called

"Amended Charges" by hand-delivery in his office late in the day on October 3, 1988, and respondent received a copy of these charges by express mail delivered to his office on October 4, 1988.

19. Neither respondent nor counsel had been previously notified of, or were in any way aware of, an investigation into respondent's conduct in re Judge Narick.

20. The so-called "Amended Charges" of October 3, 1988, were signed by Mr. Robert L. Keuch, Esquire, and were accompanied by a letter of Mr. Keuch (a copy of which is attached hereto as Exhibit B) which stated as follows:

> Enclosed are Amended Charges to the Formal Charges that were previously served upon you.
>
> *These charges* are based upon information and evidence very recently obtained during our investigation into these matters and *are served upon you pursuant to Rule 8 of the Boards Rules of Procedure.*
>
> *Pursuant to Rule 8, an answer to these amended charges shall be filed on or before October 7, 1988.* (Emphasis supplied).
>
> [(End of letter)
> (Signature of Mr. Keuch)]

21. Rule 8 of the Rules of Procedure Governing the Judicial Inquiry and Review Board (a copy of said Rules are attached hereto as an Appendix) provides:

> AMENDMENTS TO NOTICE OR ANSWER
>
> The Board, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge

shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

22. By Mr. Keuch's letter of October 3, 1988, the Board and Board Counsel set a time of three days from date of service upon respondent within which to file a written answer to the so-called "Amended Charges."

23. On October 5, 1988, a telephone conference was held before the hearing committee at Board Matter Number 140 (Judge Munley, and Messrs. Higgins and Hoyle) at which time counsel for respondent strenuously objected to the filing of the so-called "Amended Charges" and the consolidation of said Charges III, IV and V with original Charges I and II on various grounds, including: that the so-called "Amended Charges" were not Amendments permissible under Rule 8, but rather were entirely new charges which did not arise out of the proceedings at Board Matter Number 140 in any way; that these charges should therefore have been filed, if at all, as Rule 2 charges, preceded and accompanied by all of the procedural mechanisms and safeguards required by Rules 1-4; that the three days given respondent to prepare and file an answer to said charges was manifestly *per se* unreasonable, and rendered more manifestly unreasonable in light of the facts that the charges are vague and factually deficient, would require extensive investigation and preparation by counsel for respondent and because respondent and counsel live across the Commonwealth from each other and were both in the midst of intensive preparation for the October 5, 1988 scheduled hearings on Board Matter Number 140; and that the October 3, 1988 orders of the Board and Board Counsel were null and void because, inter alia, they had not been adopted by "the concurrence of a majority of [the Board's] members" as required by the Pennsylvania Constitution, Article V, section 18(b) ("The board shall act only with the concurrence of a majority of its members"), the Consolidated Statutes, 42 Pa.C.S. § 2103 ("The board shall act only with the concurrence of a majority of its members."), and Board Rule 14, all of which mandate that the Board may take no valid or legitimate action without the concurrence of at least five members (a majority)

of the Board.

24. A review of the so-called "Amended Charges" and of the transcript of the telephone conference of October 5, 1988 discloses that said "Amended Charges" were: (a) not Amendments to the original charges at all, but were rather entirely new and unrelated charges; and (b) were added to the original Formal Charges by a vote of only three Board members, namely Mr. Bruce W. Kauffman, Esquire, Chairman, the Honorable Frank J. Montemuro, Jr., and Mrs. Antonia L. Scarlata.

25. It was agreed at the conclusion of the October 5, 1988 telephone conference to schedule a further telephone conference before the three members of the Board who participated in the determination on the October 3, 1988 "Amended Charges" to resolve the issues: (1) Were the "Amended Charges" an Amendment to the Original Charges and Notice of the Institution of Formal Proceedings such that Rule 8 procedures would apply, or were they entirely new and unrelated charges such that Rule 2 procedures (and Rule 1-4 procedures) would apply; and (2) if determined to be Rule 8 "Amendments To Notice," what would be a "reasonable time both to answer the amendment and to prepare and present" a defense thereto as required by Rule 8.

26. Following the telephone conference on October 5, 1988, Board Counsel Keuch gave assurances to respondent and to counsel for respondent that the time for preparing and filing an answer to the so-called "Amended Charges" would be tolled or suspended pending resolution of the above issues and objections raised by respondent.

27. On October 6, 1988, a telephone conference was held before Mr. Kauffman, Judge Montemuro and Mrs. Scarlata at which time counsel for respondent renewed and preserved his various objections to the so-called "Amended Charges" and requested the participation of the entire Board, including the three members of the hearing committee at Board Matter Number 140 and the two Board members who had recused themselves from participation in the pending proceedings at Number 140 (i.e., Judges Rowley and Ross, *see* paragraph 11, *supra*).

28. At the conclusion of the October 6, 1988 telephone conference, the participating Board members agreed to convene

the Board En Banc for resolution of the various legal issues and objections regarding the so-called "Amended Charges" of October 3, 1988, and oral argument was scheduled in Philadelphia for October 10, 1988; at counsel for respondent's request, it was further agreed that Judges Rowley and Ross would be requested to participate in this En Banc session and determination.

29. Counsel for respondent took the position that the factual averments of the so-called "Amended Charges" would not have to be presented to the En Banc panel in order to reach a determination as to the legal issues and objections raised, and that said factual averments should not be presented to the En Banc panel in order to avoid further pollution of the hearing committee (Judge Munley, and Messrs. Higgins and Hoyle) beyond that which had already occurred when that committee was apprised that "Amended Charges" had been filed against respondent.

30. On October 10, 1988, oral argument was held before a six member En Banc panel of the Board consisting of Mr. Kauffman, Judge Montemuro, Judge Munley, Mr. Higgins, Mr. Hoyle, and Mrs. Scarlata; Judges Rowley and Ross declined respondent's request to participate in this determination of the legal issues and various objections to the so-called "Amended Charges" and their impact upon the pending proceeding at Board Matter Number 140; the factual averments of the so-called "Amended Charges" were not presented to this En Banc panel during this proceeding of October 10, 1988.

31. The following day, October 11, 1988, the six member panel of the Board issued the following order (a copy of which is attached hereto as Exhibit C):

> AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:
>
> 1) The charges filed on October 3, 1988 shall be *deemed to have been filed pursuant to* Judicial Inquiry and Review Board *Rule of Procedure 2 rather than* Judicial Inquiry and Review Board *Rule of Procedure*

8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.

2) The October 3, 1988 charges were correctly and properly issued.

3) *In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard ab initio by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.* (Emphasis added).

32. Respondent received a copy of the October 11, 1988 order "deeming" the previously-called "Amended Charges" to have been Rule 2 charges (despite the failure to comply with the mandated Rule 1 procedures which must, by Supreme Court Rule, precede a Rule 2 Notice of Formal Proceedings) on October 12, 1988 by express mail delivery to his office (which service was defective under Rule 2(c)).

33. By letter of October 12, 1988 to Mr. Keuch (a copy of which is attached hereto as Exhibit D), counsel for respondent expressed his "desire to interview some and perhaps all of the members of the Judicial Inquiry and Review Board."

34. By letter of October 13, 1988 to the Board members and Mr. Keuch (a copy of which is attached hereto as Exhibit E), counsel for respondent made some "observations and requests" concerning "the Board's" order of October 11, 1988, including a request to extend the time set therein (October 24, 1988) for respondent to file a written answer to the new "Reapproved Charges" III, IV and V of October 11, 1988, and a request for a "writing in the nature of a Bill of Particulars" concerning these vague and factually insufficient charges and sought the Board members' and Board Counsel's "advice with a prayer that it be given promptly."

35. On October 20, 1988, Board Counsel Keuch responded to counsel for respondent's letters of October 12th and 13th

with two separate letters, as follows:

a) Response to letter of October 12, 1988 (a copy of which Response is attached hereto as Exhibit F) - The "Board requests that you put such request [to interview Board members] in writing specifying the areas of your inquiry and reasons why such an inquiry is necessary" ... to establish "good cause with specificity for your request;" and

(b) Response to letter of October 13, 1988 (a copy of which Response is attached hereto as Exhibit G) - This letter advises counsel for respondent that on the one hand, "the Board is very concerned about the need to expedite the proceedings against a sitting member of the Judiciary ... particularly ... a member of the highest court." Accordingly, "the Board" denied the request for an extension of time to answer the "Reapproved Charges" III, IV and V. However, on the other hand, said letter of Mr. Keuch "offers" respondent an "extension of time to answer the charges" to November 7, 1988, *but only upon* respondent's "written waiver of the [twenty day] notice hearing requirements of Rule 4" on or before October 24, 1988, in which event, "should hearings be necessary on the ["reapproved"] charges issued October 3, 1988, the hearings will commence on November 9, 1988 at 10:00 a.m.," at which time the Board would consider respondent's requests for "any additional time necessary to prepare the defense...."

36. Respondent and his counsel have attempted to investigate the allegations set forth in the "Reapproved Charges" III, IV and V to the best of their abilities and available resources, but they have been and are substantially handicapped by the vagueness and factual insufficiency of said charges and the illegal and constitutionally inadequate time set by "the Board" within which to file a written answer (the illegality and unconstitutionality of "the Board's" actions, including said time period, will be discussed fully *infra*).

37. On October 24, 1988 at approximately 4:50 p.m., respondent filed with the Board his response to "the Board's" actions and order of October 11, 1988 consisting of an Omnibus Supplemental Application with Notice to Plead attached, and an Application for Stay of All Proceedings at Board Matter Number 140 and Request for Oral Argument (which Applications are incorporated herein by reference) setting forth most (85) of the averments and requests for relief set forth and requested herein; said averments have not been denied.

38. The Omnibus Supplemental Application supplemented counsel for respondent's letter of October 13, 1988 and was an application in the nature of various pretrial motions and objections to the extraordinary order of October 11, 1988 establishing the contemplated unheard of En Banc hearing *ab initio* on consolidated Charges I-V before six members of the Board, aborting all of the prior proceedings, and violating numerous procedural and substantive rights of respondent provided by the due process, equal protection and double jeopardy provisions of the Constitutions of the United States and of this Commonwealth, the Consolidated Statutes of this Commonwealth and of the United States, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness and fair play.

39. Between 1:00 p.m and 2:00 p.m. on October 24, 1988, a courtesy copy of a "Notice of Hearing" was hand delivered to the office of counsel for respondent (who did not, however see said copy until the following morning), which Notice (a copy of which is attached hereto as Exhibit H) provides:

NOTICE OF HEARING
(J.I.R.B.R.P. 4)

> And now, the 24th day of October, 1988, notice is hereby given to all interested parties that a hearing pursuant to J.I.R.B.R.P. 5 shall be held on Monday, November 14, 1988, beginning at 10:00 A.M. in Commonwealth Court, Courtroom Number One, Fifth Floor, South Office Building, Harrisburg, Pennsylvania.

For the Judicial Inquiry and
Review Board
/s/ ROBERT L. KEUCH

Robert L. Keuch
Executive Director and
General Counsel

cc: The Honorable Rolf Larsen
A. Charles Peruto, Esquire
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James M. Munley
Mr. James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Mrs. Antonia L. Scarlata

40. A copy of said Notice of Hearing was mailed by Federal Express at "1840" hours on October 24, 1988 to respondent's chambers in Pittsburgh, and received there at approximately 9:20 a.m. on October 25, 1988 nineteen days prior to the hearing date set by said Notice of November 14, 1988; respondent was in Philadelphia the entire week of October 24-28, 1988 attending an argument session of the Pennsylvania Supreme Court.

41. On October 31, 1988, Board Counsel Keuch issued an order "For the Judicial Inquiry and Review Board" which states "after due deliberation, the Board, with six members sitting, unanimously holds that": all of the request for relief set forth in respondent's Supplemental Omnibus Motion are denied (a copy of said order is attached hereto as Exhibit I).

42. Said order of October 31, 1988 specifically denies respondent's: (1) application for stay of all proceedings; (2) notice to plead (which was quashed without response to the averments set forth in the Supplemental Omnibus Application); (3) request for oral argument; (4) application to quash Charges III, IV and V; (5) application for stay or dismissal of all proceedings; (6) application to sever charges; (7) application to dismiss charges III, IV and V for lack of specificity, or for a bill of particulars; (8) application to dismiss Charges I and II on double jeopardy grounds; (9) application to dismiss all charges on double jeopardy grounds; (10) and request for

extension of time to file a written answer to Charges III, IV and V. (All of these requests are renewed in the instant Second Applications to the Supreme Court which, additionally, raises a claim of denial of respondent's constitutional right to counsel of his own choosing based upon "the Board's" actions of October 24, 1988 setting a hearing date of November 14, 1988 at a time when the Board knew that counsel for respondent was unavailable.)

43. Respondent now files this Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief in the Supreme Court raising various objections and challenges to the illegal, arbitrary, capricious, and unconstitutional actions of Mr. Keuch and/or the En Banc panels of the Board in these proceedings, and in particular the actions of various panels of the Board and Board Counsel on October 3, 11, and 24, and 31, 1988, which Second Applications seek the relief requested herein under the Constitutions of the United States and of this Commonwealth which guarantee respondent due process of law, equal protection of law, the right not to be twice placed in jeopardy of punishment and prosecution for the same offense and the right to counsel, the Consolidated Statutes of this Commonwealth and of the United States, the Rules of Procedure Governing The Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, justice and fair play.

I. APPLICATION TO QUASH ADDITIONAL FORMAL CHARGES III, IV AND V AND TO VACATE THE ACTIONS AND DECISIONS OF "THE BOARD" OF OCTOBER 3, 11 AND 24, 1988

A. Violation of Supreme Court Rules of Procedure-Actions/Decisions of October 3 and 11, 1988

44. As explicitly demonstrated by the so-called "Amended Charges" of October 3, 1988 themselves (Exhibit A), by the accompanying letter of Mr. Keuch (Exhibit B), and by the transcripts of the proceedings of October 5, 6 and 10, 1988, the "Amended Charges" were filed and served upon respondent "pursuant to Rule 8 of the Board's Rules of Procedure."

45. Despite this explicit (and improper) reliance upon Rule 8 as the mechanism for filing the "Amended Charges," "the Board's" order of October 11, 1988 (Exhibit C)"deems" the Rule 8 Charges to have been filed as Rule 2 Charges that were "correctly and properly issued."

46. The record does not support the conclusion that "The October 3, 1988 charges were correctly and properly issued;" to the contrary, the record of the proceedings and documents unequivocally demonstrates that "the Board's" "Amended Charges" and/or "Reapproved Charges" of October 3 and/or 11, 1988 failed to comply with the Supreme Court's mandated procedures of Rules 1 and 2 that are prerequisites for the filing of a Notice of Formal Proceedings and Formal Charges under Rule 2, and also violated the constitutional and statutory requirements that the board can act "only with the concurrence of a majority of its member," i.e. five members, see paragraphs 100-112, *infra*.

47. The applicable Rules provide, in relevant portions:

Rule 1. PRELIMINARY INVESTIGATION

(a) The Board, of its own volition, or upon receiving a statement not obviously unfounded

or frivolous . . . *shall make a preliminary investigation to determine whether formal proceedings should be instituted* and a hearing held. . . .

(b) *If, after preliminary investigation, it is felt the complaint warrants further investigation, the judge shall be notified* of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the Board's own motion, *and shall be afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail* addressed to the judge at his chambers. . . .

Rule 2. NOTICE OF FORMAL PROCEEDINGS

(a) After the investigation has been completed, if *the Board concludes that formal proceedings should be instituted, the Board shall* without delay issue a written notice to the judge . . . .

(b) The notice *shall specify in ordinary and concise language* the charges . . . and the alleged facts upon which such charges are based, and *shall advise the judge of his right to file a written answer* to the charges against him *within twenty (20) days after service upon him.*

(c) The notice *shall be served* upon the judge by mailing, *by prepaid registered or certified mail,* a copy of the notice . . . .

RULE 23. DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) "Board" means the Judicial Inquiry and Review Board.

(e) *"Shall" is mandatory* and "may" is permissive.

48. On the record, it is undisputed that respondent was never notified prior to October 4, 1988 of any investigation against him in re Judge Emil Narick and was never "afforded reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the Board prior to its determination of "whether formal proceedings should be instituted and a hearing should be held," as mandated by Rule 1(a) and (b).

49. To the contrary, the determination to institute formal proceedings regarding Judge Narick's apparent allegations and to hold a hearing was a fait accompli when respondent received defective notice of same (i.e., by express mail rather than by registered or certified mail) in his chambers on October 4, 1988.

50. Under the mandatory requirements of Rule 1(a) and (b) and Rule 2 adopted by the Pennsylvania Supreme Court, respondent is absolutely entitled to proper notice and a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" to the entire Board *before the Board may make its determination* that formal proceedings should be instituted by a Rule 2 Notice of Formal Proceedings and Formal Charges.

WHEREFORE, the failure of both the three member En Banc panel and the six member En Banc panel of the Board to comply with the Supreme Court's Rules of Procedure, namely Rules 1(a), (b) and 2(a), has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth and by the Consolidated Statutes of this Commonwealth and of the United States; Charges III, IV and V should, therefore, be quashed.

B. Violation of Supreme Court Rules of Procedure - Actions/Decisions of October 24, 1988

51. As noted, Rule 2(b) provides that the Notice of Formal Proceedings "shall advise the judge of his right to file a written answer to the charges against him within (20) days after service upon him;" twenty days after service of the invalid October 3, 1988 "Amended Charges" upon respondent expired on October 24, 1988 at midnight, which was also the time set by "the Board's order of October 11, 1988.

52. Rule 4 provides:

SETTING FOR HEARING BEFORE BOARD

After the filing of an answer or upon expiration of the time for the filing, the Board shall order a hearing to be held concerning the charges, which, if sustained, may lead to the suspension, removal, discipline or compulsory retirement of the judge. *The Board shall set a time and place for hearing and shall give notice*

of such hearing by mail to the judge *at least twenty (20) days prior to the date set.*

53. "The Board" did not "order a hearing" and "set the time" for said hearing "*after . . . expiration of the time* for the filing" of the answer (which time was at the earliest, pursuant to "the Board's" order of October 11, 1988, at midnight on October 24, 1988), but rather Board Counsel Keuch issued a Notice of Hearing (Exhibit H) prior to 1:00 p.m. on October 24, 1988, approximately twelve hours before the time for filing the answer to Charges III, IV and V had expired, in violation of Rule 4.

54. Said Notice of Hearing illegally set the time for hearing at 10:00 a.m. on November 14, 1988, and a copy of said Notice of Hearing was received by respondent on October 25, 1988.

55. Rule 4 provides that the judge must be given notice of hearing "at least twenty (20) days prior to the date set" in the notice. The Notice of Hearing of October 24, 1988 sent in this case to respondent (Exhibit H) violates Rule 4 in that it provides only nineteen days notice "prior to the hearing date," as the first day of the twenty day period (October 25th) is excluded from the calculation, *see* Pa. R.Civ.P.Rule 106(a), and the last day to provide a full twenty days notice *prior to the hearing* as required by Rule 4 is, therefore, November 15, 1988.

WHEREFORE, the failure of "the Board" acting through Board Counsel Keuch on October 24, 1988 to comply with the Supreme Court's Rules of Procedure, namely Rules 2(b) and 4, has deprived respondent of significant procedural protections established by said Rules and has deprived respondent of due process and equal protection of law as guaranteed him by the Constitutions of the United States and of this Commonwealth, and by the Consolidated Statutes of this Commonwealth and of the United States; the Notice of Hearing of October 24, 1988 illegally setting a hearing date of November 14, 1988 should, therefore, be vacated.

C. Composition of Judicial Inquiry and Review Board

56. Article V, section 18 of the Pennsylvania Constitution

provides, in relevant portion, as follows:

> Suspension, removal, discipline and compulsory retirement
>
> (a) There *shall be a Judicial Inquiry and Review Board having nine members as follows*: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.
>
> (b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. *A vacancy on the board shall be filled by the respective appointing authority for the balance of the term.* The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board *shall act only with the concurrence of a majority of its members.* (emphasis added)

See also 42 Pa.C.S.A. § 2101-03 (implementing and paralleling Article V, section 18) and Board Rule 14.

57. As set forth previously, the Constitution, Consolidated Statutes and Board Rules mandate, therefore, the affirmative vote of a concurrence of a majority of the Board's members, ie. five members, before any action can legitimately be taken by the Board; anything less is a nullity.

58. The composition of the Judicial Inquiry and Review Board, established by the Pennsylvania Constitution and the Consolidated Statutes, represents an exact and a delicate balance of Superior Court and Common Pleas Court judges, lawyers and laypersons, and explicitly contemplates and mandates the participation by the full complement of nine members in taking actions, issuing orders and making decisions, since the respective appointing authority at all times is required to fill

any vacancy for the remainder of the vacant term of office.

59. It has been admitted throughout these proceedings by Board Counsel and various Board members that there are inherent and inevitable due process dangers of commingling of prosecutorial and adjudicatory functions of the Board, dangers clearly illustrated by the *ex parte* injection by Mr. Keuch of the extraneous and prejudical "Kenneth Ross" matter into these proceedings. *E.g.*, Notes of Testimony, September 12, 1988 at 1204-14, and September 13, 1988 at 1441-96 (copies of which are attached hereto as Exhibit J).

60. Said "Kenneth Ross" matter was injected into the proceedings in the following manner:

(a) On September 9, 1988, Board Counsel Keuch presented, *ex parte*, during a conference call with all eight remaining members of the Board, information that one "Kenneth Ross" had gone to Joel Aaronson, a lawyer who had already testified for the Board in these proceedings, in August of 1988, and allegedly told him (Aaronson) that "Justice Larsen remembers his friends and his enemies, words to that effect." N.T., September 13, 1988 at 1441-42;

(b) Board Counsel Keuch had actual knowledge of this information and allegation prior to the commencement of these proceedings on August 22, 1988;

(c) Board Counsel Keuch stated that he "had absolutely no evidence whatsoever that the respondent was involved in the [Kenneth Ross] contact, encouraged it, had any part whatsoever in the contact," N.T. September 12, 1988 at 1209;

(d) Board Rule 1(c) provides a mechanism for investigating complaints against a member of the judiciary by a two member investigating committee of the Board;

(e) Board Counsel Keuch did not utilize this procedure, of which he was well aware, to investigate these "Kenneth Ross" allegations;

(f) Board Counsel Keuch, instead, chose to inform the "entire" Board (less Judge Bonavitacola) in an *ex parte* telephone conference in the midst of these proceedings that Kenneth Ross had stated that Justice Larsen remembers his friends and enemies, thus prejudicing respondent by improperly intimating, without any factual basis whatsoever, that respondent had participated in tampering with a Board

witness;

(g) The "Kenneth Ross" matter was then, at the direction of the eight members of the Board, referred to law enforcement authorities for criminal investigation of Mr. Ross' alleged behavior.

61. Due to the pollution and contamination of the hearing committee caused by the deliberate *ex parte* injection into the proceedings of the irrelevant and extremely prejudicial "Kenneth Ross" matter by Board Counsel Keuch, counsel for respondent moved for a mistrial on September 13, 1988, Notes of Testimony at 1441-1463, which motion was denied by the hearing committee.

62. In contrast to this handling of the "Kenneth Ross matter," the hearing committee, at the insistence of Board Counsel Keuch, has refused to allow respondent to impeach the credibility of one of the Board's principal witnesses against respondent, Frank DiPlacido (the principal, active member of Highpointe Associates, the proposed developers of the condominium project which is the subject of Charge II), by use of this witness' 1981 felony convictions for his participation as a principal member of a nationwide criminal conspiracy to distribute substantial quantities of cocaine through the Federal Express system, even though said convictions are admissible to impeach the credibility of a witness in this Commonwealth. *See* Respondent's Memorandum of Law, a copy of which is attached hereto as Exhibit K. The hearing committee has directed that DiPlacido's prior felony convictions cannot be used to impeach his credibility and have ordered all references to said convictions be striken from the record, thus insulating the non- hearing committee members of The Board from "contamination" by this information.

63. Thus, while respondent is improperly and erroneously denied the opportunity to impeach the credibility of his accuser by use of actual felony convictions for crimes reflecting on the witness' integrity and veracity, and the hearing committee takes pains to insulate the record from this information, respondent is prejudiced and damaged by Board Counsel's deliberate, improper *ex parte* injection into these proceedings of irrelevant and extremely prejudicial allegations attempting without foundation to link him inferentially to possible witness

tampering.

64. The constitutional and statutory composition of the Board, consisting of a majority of judges who are professionally trained to and experienced in remaining impartial in judicial proceedings, and the constitutional and statutory requirement that the Board shall only act with the concurrence of a majority of its members, are safeguards of the Article V, section 18 Judicial Inquiry and Review Board system that could possibly mitigate the dangers recognized and caused by the commingling of prosecutorial and adjudicatory functions.

65. The "Amended Charges" of October 3, 1988 were initially approved and filed by three members of the Board only, consisting of one Superior Court judge, one lawyer and one layperson; the "Reapproved Charges" of October 11, 1988 were approved by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons; and the Notice of Hearing of October 24, 1988 was, on its face, issued only by Mr. Keuch, the prosecutor for the Board; the order of October 31, 1988 was issued by only six members of the Board consisting of one Common Pleas judge, one Superior Court judge, two lawyers and two laypersons.

66. Because Board Counsel Keuch, improperly and *ex parte*, chose to inject and mix these entirely distinct and separate Charges III, IV and V into the pending proceedings at Board Matter 140 against respondent, Judges Rowley and Ross, material witnesses in Board Matter 140, declined to participate in the determination to institute formal proceedings as to the "Amended Charges" of October 3, 1988, and declined to participate in the October 10, 1988 oral argument; as noted, Judge Bonavitacola has already resigned as a member of the Board and his office remains vacant.

67. Thus, the delicate mechanism established by Article V, section 18 has been dismantled (i.e., at times three fifths of the judicial members of the Board have not participated in the actions and decisions rendered by "the Board," and at times fully one-third to two-thirds of the entire Board have not participated in the actions and decisions rendered by "the Board," and, at times, actions and decisions of "the Board" have been rendered solely by Mr. Keuch, the prosecutor for the Board),

and determinations detrimental to respondent (i.e., the October 3, 11, 24, and 31, 1988 actions and orders) have been made by unconstitutional and illegal panels of the Board or its prosecutor.

WHEREFORE, it is submitted that the actions, orders and determinations of October 3, 11, 24, and 31, 1988 rendered by constitutionally and statutorily deficient panels of the Board and/or its prosecutor have deprived respondent of due process and equal protection of law and of the safeguards and protections mandated by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth; Charges III, IV and V should, therefore, be quashed, and "the Board's" actions and orders of October 3, 11, and 24, 1988 should be vacated.

II. APPLICATION FOR STAY OF PROCEEDINGS OR DISMISSAL

A. Breach of Confidentiality of Proceedings

68. Throughout these proceedings, as demonstrated by testimony and exhibits throughout the record, there have been monumental and continual leaks of confidential information arising within these proceedings, which information has led to numerous inflammatory, prejudicial and highly selective articles being published in the Pittsburgh Post-Gazette and the Philadelphia Inquirer. *See, e.g.* articles of October 8, 1988, attached hereto as Exhibits L and M, and Notes of Testimony, September 14, 1988 at 1660-1701 and Respondent's Exhibits 40A-C.

69. On October 7, 1988, on a television program on WQEX in Pittsburgh wherein Pittsburgh Post-Gazette reporters and editors comment upon newspaper articles and stories, reporter Bill Moushey discussed his upcoming article of October 8, 1988 ("Narick tells of Larsen conduct.") and responded to questions concerning new Larsen charges filed by the Board with reference to "my (Moushey's) sources on the Board" and to information obtained from "a Board member."

70. On October 26, 1988, the Philadelphia Inquirer, over the by-line of Daniel R. Biddle, published an article entitled "Inquiry is unfair, says Larsen" (a copy of which is attached

hereto as Exhibit N) wherein selected portions of respondent's Supplemental Omnibus Application were quoted and discussed.

71. Said Supplemental Omnibus Application was hand-delivered to the offices of the Board in Harrisburg at approximately 4:50 p.m. October 24, 1988 in sealed envelopes marked personal and confidential to the eight remaining members of the Board and to Mr. Keuch.

72. Said Philadelphia Inquirer article of October 26, 1988 states, inter alia: "In confidential papers filed Monday with the Judicial Inquiry and Review Board...." and "A copy of [Larsen's Application] was obtained last night by the Inquirer."

73. Neither respondent nor counsel for respondent have given or leaked any confidential information concerning these proceedings to any member of the media; on the other hand, the Board, through its Counsel, has advocated in the Supreme Court a position supporting the leaking of confidential information to the media by the lawyer members of the Board. *See Office of Disciplinary Counsel v. Surrick*, No. 508 Disc. Dkt. No. 2, J-186-1988 (argued October 25, 1988) amicus brief of Board on behalf of Surrick.

74. It is an inescapable conclusion, therefore, that confidential information has been directly leaked and continues to be directly leaked to reporters Bill Moushey and Dan Biddle by sources on or within the Board.

WHEREFORE, it is respectfully requested that all proceedings at Board Matter 140 be dismissed because of the blatant and serious breach of the confidentiality of these proceedings which has irreparably harmed respondent and prejudiced him and has hampered his defense of the charges against him; alternatively, respondent requests these proceedings be stayed pending an evidentiary hearing before an impartial tribunal to determine the source of the leaking of confidential information to the media in violation of the confidentiality of the proceedings mandated by the Constitution of this Commonwealth.

B. Composition of Judicial Inquiry and Review Board

75. As set forth in the preceding section, the actions of the six member En Banc panel of the Board, and the ordered hearings *ab initio* before those six members on November 14, 1988, violate and will violate the constitutional and statutorily mandated composition of the Board.

76. The vacancy created by the resignation of Judge Bonavitacola, whose term of office would have expired on January 1, 1989, has not been filled by the Supreme Court.

77. Additionally, the recusal of Judges Rowley and Ross from all legal and factual matters involving respondent at Board Matter Number 140 has resulted in the *de facto* vacancy, for all practical effects and purposes, of those two judge members of the Board in this matter.

78. Judge Rowley's term of office on the Board expires on December 3, 1988; Judge Ross' term of office on the Board expires on January 1, 1989.

WHEREFORE, as respondent has been and will be deprived of his constitutional and statutory rights to be judged by a full nine member Judicial Inquiry and Review Board consisting of two judges of the Superior Court, three judges of the Courts of Common Pleas, two lawyers and two laypersons, and has been therefore denied due process and equal protection of the laws guaranteed by the Constitutions and the Consolidated Statutes of the United States and of this Commonwealth, respondent requests the Supreme Court to stay all further proceedings in this matter pending the appointment by that Court of the appropriate Superior Court and Common Pleas judges to fill the vacancies of Judges Bonavitacola, Rowley and Ross or until after the Supreme Court fills all three said vacancies in due course after expiration of the respective terms of office.

III. APPLICATION TO SEVER CHARGES

A. Charges III, IV and V

79. It is clear that the "Amended/Reapproved Charges" III, IV and V could not be filed as Rule 8 amendments to the

pending proceedings at Board Matter Number 140 because said charges did not "conform to proof or . . . set forth additional facts" developed at said proceedings; the order of six members of the Board of October 11, 1988 conclusively establishes that said charges were not Rule 8 "Amendments."

80. Charges III, IV and V concern allegations made by Judge Narick of unrelated and completely separate *ex parte* communications alleged to have been made by respondent from 1984-1986 allegedly involving separate and distinct parties, dates and cases.

81. Judicial Inquiry and Review Board Proceedings have been determined to be quasi-criminal proceedings. *Matter of Dandridge*, 462 Pa. 67, 74, 337 A.2d 885, 888 (1975); *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743, 745, 758 (1979).

82. As Judge Munley has stated, the quasi-criminal nature of the instant proceedings "would raise the plethora or the umbrella of all of the protection that would flow to a person in a criminal setting." Notes of Testimony, October 5, 1988 at 1728. *See also* concurring and dissenting opinion of Justice McDermott in *Judicial Inquiry and Review Board v. Snyder*, ____ Pa. ____, 523 A.2d 294, 300-01 (1987) ("The removal of a duly elected judicial officer is a matter of the gravest possible concern. The exercise of such power must be rounded *at the very least*, with all the fundamental protections known to the constitutional jurisprudence of this Commonwealth.")

83. The Pennsylvania Rules of Criminal Procedure provide:

> RULE 229. AMENDMENT OF INFORMATION
>
> The court may allow an information to be amended when there is a defect in form, the description of the offense, the description of any person or any property, or the date charged, *provided the information as amended does not charge an additional or different offense*. Upon amendment the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

84. As a quasi-criminal prosecution, the joining (amending) of new Charges III, IV and V with Charges I and II is absolutely

prohibited by Pa. Crim. Pro. Rule 229 and caselaw applying Rule 229. *See, e.g., Commonwealth v. Shirey*, 333 Pa. Super. 85, 481 A.2d 1314 (1984), appeal after remand, 343 Pa. Super. 189, 494 A.2d 420 (1985); *Commonwealth v. Gray*, 329 Pa. Super. 347, 478 A.2d 822 (1984).

85. Even in a civil proceeding joinder of entirely new and unrelated causes of action with the original causes of action at this stage of the proceedings would be prohibited and prejudicial. *Trabue v. Walsh*, 318 Pa. 391, 177 A. 815 (1935); *see* Pa. R.Civ.Pro. Rule 213.1 (consolidation of causes of action prohibited unless involving common question of law or fact) and *Lohmiller v. Weidenbaugh*, 302 Pa.Super. 174, 448 A.2d 583 (1982), rev'd on other grounds, 503 Pa. 329, 469 A.2d 578 (1983).

86. The United States Supreme Court has declared that a respondent to a quasi-criminal disciplinary board proceeding is deprived of fair notice of charges against him and of procedural due process where charges against the respondent are added during disciplinary proceedings based on evidence adduced at said proceedings. *In Re Ruffalo*, 390 U.S. 544 (1968); *a fortiori* charges added to and during a pending proceeding based upon investigations totally extraneous to the proceeding would deprive the respondent of fair notice and due process per *Ruffalo*.

87. The United States Supreme Court stated in *Ruffalo*, 390 U.S. at 551:

> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 US 1, 33, 18 Led 2d 527, 549, 87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

88. Likewise in the instant proceedings, the manner in which the original charges would have been met (defense strategy, witnesses, pleadings, etc.) could have been and would have been substantially altered had Charges III, IV and V been filed prior to the commencement of this complicated and lengthy proceeding, so that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.*

89. *See also Judicial Inquiry and Review Board v. Fink*, 516 Pa. 208, 532 A.2d 358, 361 (1987). ("We do not address or consider the Board's findings that Respondent attempted to deceive the Board concerning the proffered testimony of the 'mystery witness' because those findings do not concern formal charges made against the Respondent. If the Board wishes to initiate action against the parties involved in the 'mystery witness' episode, *then formal proceedings should be commenced, those charged should be notified of the charges against them, and they should be given an opportunity to prepare a defense and respond to the charges*. For purposes of the adjudication of this case, the 'mystery witness' matter has no bearing and forms no part of our consideration or rationale.")

90. As noted in paragraph 13 herein, substantial time, energy, financial expense and legal and judicial resources have been expended in defending Charges I and II at Board Matter Number 140, and the respondent's defense was approaching completion.

91. Respondent's defense presentation and strategy has at all times been designed and molded to conform to the original Charges I and II as to which he had been noticed and responded pursuant to Article V, section 18 and the Rules of Procedure Governing The Board.

WHEREFORE, it is submitted that it is manifestly unfair and is a denial of due process, and equal protection guaranteed by the Constitutions and the Consolidated Statutes of the United States and of this Commonwealth, the analogous rules of criminal procedure and fundamental notions of fair play to consolidate Charges III, IV and V with Charges I and II at Board Matter 140, and respondent requests severance of Charges III, IV and V not only from original Charges I and II, but also

severance of each Charge III, IV and V to be separately noticed and heard in separate proceedings before the Board.

B. Charges I and II

92. Original Charges I and II concern allegations and averments of unrelated and completely separate and distinct events and matters which should not be consolidated in a single proceeding as required by the En Banc six member panel's order of October 11, 1988.

WHEREFORE, upon commencement of new hearings *ab initio* of said Charges I and II as directed by the orders of October 11 and 24, 1988, Formal Proceedings regarding said charges should be also severed and prosecuted in separate proceedings.

IV. APPLICATION FOR DISMISSAL OF CHARGES III, IV AND V FOR LACK OF SPECIFICITY OR, ALTERTATIVELY, FOR MORE SPECIFIC CHARGES OR FOR A PLEADING IN THE NATURE OF A BILL OF PARTICULARS

93. New Charges III, IV and V are insufficient and fail to "specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based," (see Rule 2(b)) specifically:

(a) Charge III gives no docket number or other citation to *Mercede Center, Inc. v. Equibank, Cook and Caribank* nor does it specify the relevant time frame;

(b) Charge IV gives no case name, no docket number or other citation to "a zoning case involving a business entity named *McDermott Land Company*," nor does it specify the relevant time frame;

(c) Charge V is totally lacking in factual averments in that it fails to identify any relevant time frame for the alleged improper *ex parte* communications regarding "certain tax appeal cases" being "handled by Attorney Leonard Mendelson" other than "at some point" after 1984, and gives neither case names, docket numbers, or other citations, nor the names of "particular judges" alleged.

94. Due to the lack of specificity and conciseness in said

Charges III, IV and V it is impossible to prepare an intelligent responsive answer to said vague and non-specific charges which are constitutionally deficient in failing to provide adequate notice of the charges against respondent.

WHEREFORE, respondent requests dismissal of Charges III, IV and V for failure to specify the charges and the alleged facts upon which they are based and said charges deprive respondent of due process and equal protection of law as guaranteed by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth in failing to provide adequate notice of the charges against him denying him, therefore, a meaningful opportunity to defend against said charges; in the event said charges are not dismissed, respondent requests the Supreme Court to direct the Board to supply more specific charges or a pleading in the nature of a bill of particulars.

V. APPLICATION TO DISMISS ORIGINAL CHARGES AND II ON GROUNDS OF DOUBLE JEOPARDY

95. As set forth in paragraph 13 herein, respondent has expended considerable time, energy and personal and financial resources in his defense to the original Charges I and II as to which he received the requisite Notice of Formal Proceedings at Board Matter Number 140.

96. The order of the six member panel of the Board of October 11, 1988 "directs the panel currently hearing Board Matter 140 to suspend hearings on that matter."

97. That order further states that: "3. In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members."

98. The Notice of Hearing executed by Board Counsel Keuch on October 24, 1988 informs respondent that the contemplated, consolidated hearing *ab initio* on all Charges I-V will commence on November 14, 1988.

99. Thus, the orders of October 11, 24, and 31, 1988 *sua sponte* abort the proceedings at Board Matter Number 140 (in effect, declare a "mistrial") without cause of a necessitous

and compelling nature, and compel respondent to stand trial anew despite the enormous time, energy and personal and financial resources he has been forced to expend to date to defend against Charges I and II.

100. It is submitted and the record will demonstrate that respondent was and is prevailing on the merits of Charges I and II, and that the extraordinary, unprecedented and unheard of procedure (never in the history of the Board has a hearing committee of more than three members of the Board been convened) directed by the six member panel of the Board on October 11, 1988 and by Mr. Keuch on October 24, 1988, was designed to attempt to ensure the participation of Chairman Kauffman in these proceedings (now as to expanded Charges I-V) so that he may act and cast his vote against respondent and so that he may continue to orchestrate these proceedings to respondent's disadvantage; respondent's allegations in this regard are based upon and supported by the following averments and inferences:

(a) Chairman Kauffman's term of office on the Board will expire at 12:01 a.m. on November 15, 1988;

(b) Chairman Kauffman has been asked by respondent to recuse himself from these proceedings due to his demonstrable personal bias, hostility and animosity toward respondent and his "unalterable personal view that Justice Larsen had to be removed from the bench" (*see* affidavit of Richard A. Sprague, Esquire, attached hereto as Exhibit O);

(c) Chairman Kauffman would be relieved of his duties on November 15, 1988 and he would have no further official or authorized participation in the deliberations and determination of these proceedings against respondent, unless he were a member of a hearing committee participating in "any hearing in progress at the end of his term;" *see* Article V, section 18(b); 42 Pa.C.S.A. § 2102(b);

(d) The order of October 11, 1988 "deeming" its void, invalid and unconstitutional action of October 3, 1988 effective as of October 3, 1988 and retroactively setting a time to answer the "deemed" Rule 2 "Reapproved Charges" III, IV and V by October 24, 1988 (i.e., twenty days from October 3, 1988), was a superficial attempt to appear to comply with Rule 4 by setting a hearing date on the now "consolidated" charges

before November 15, 1988 since Rule 4 requires the Board to "give notice of such hearing. . . at least twenty (20) days prior to the date set," but only after a twenty day period within which to file an answer to formal charges has elapsed;

(e) As noted previously, the order of October 11, 1988 "deeming" pseudo-life into the void, invalid and unconstitutional previously-called "Rule 8 Amended Charges," and retroactively "deeming" said charges to have been "correctly and properly issued," which, in fact, only gave respondent twelve days in which to file an answer, deprives respondent of the full time mandated by the Rules, and mandated by due process and equal protection, by depriving him of the full twenty days required by Rule 2(b) and of the additional time required by Rule 1(b) ("reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose"); the twenty days to file a written answer to charges provided by Rule 2(b) should thus run from October 12, 1988 (date of defective service of the order of October 11, 1988), and thus November 1, 1988 should have been the absolute minimum time set by the order of October 11, 1988 within which to file a written answer;

(f) Moreover, the order of October 11, 1988 deprives respondent of the time provided by the explicit assurances made by Board Counsel Keuch on October 5, 1988 that the time for filing a written answer to Charges III, IV and V would be tolled or suspended pending disposition of respondent's then objections to the attempted "Amended Charges" III, IV and V;

(g) The letter of Mr. Keuch of October 20, 1988 further supports the inference of an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, in that it: offers, on the one hand, the incredible and unbelievable assertion that "the need to expedite proceedings against a sitting member of the Judiciary . . . particularly . . . a member of the highest court" justifies the blatant violations of due process, equal protection and other provisions of the state and federal constitutions, of the Consolidated Statutes, and of the Board's own Rules promulgated by the Supreme Court; and yet, on the other hand, it "magnanimously offers" to extend the time for filing an answer to Charges III, IV and V, but only upon the

coercion of a written waiver of the twenty days required by Rule 4 and commencement of the hearings *ab initio* on November 9, 1988; this "time is of the essence" assertion is implausible and unbelievable because said letter of October 20th states that on November 9, 1988, the "first order of business . . . will be the consideration of any motions . . . including the request for any additional time necessary to prepare the defense. . . ." additionally, the order of October 31, 1988 (Exhibit I) provides that "at the commencement of the hearing on November 14, 1988 [the Board] will consider a request for an extension of time to prepare a defense;"

(h) The Notice of Hearing of October 24, 1988 further supports the inference of a willingness to ignore the Board's own Rules in an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, in that: said Notice was entered solely by Board Counsel Keuch without consideration by the Board members as required by constitution, statute and rules of procedure; said Notice was entered in violation of Rule 4 which states that the Board shall set a hearing date *only after* the expiration of the time for filing an answer; even per "the Board's" illegal order of October 11, 1988, the time for filing an answer could not have expired, at the earliest, until midnight on October 24, 1988, yet the Notice of Hearing was executed by Mr. Keuch prior to 1:00 p.m. on October 24, 1988; said Notice sets an illegal hearing date which deprives respondent of one day of the twenty day *prior*-to-hearing-date notice absolutely required by Rule 4 (*see* paragraph 55, *supra*);

(i) The denial of respondent's Supplemental Omnibus Applications on October 31, 1988 (Exhibit I) further supports the inference of an attempt to ensure Chairman Kauffman's participation in Board Matter Number 140, and to otherwise deprive respondent of a fair hearing, due process of law, equal protection, right not to be twice placed in jeopardy of punishment and prosecution, right to counsel, and of other procedural and substantive rights derived from the Constitutions and Consolidated Statutes of the United States and of this Commonwealth, and of the Board's own rules, in that said action of October 31, 1988 denies all of respondent's requests for relief without any answer being filed to the averments, without oral argument and without opinion;

(j) The illegal and unconstitutional actions and timings discussed in sub-paragraphs (d-i) are designed and intended to "lock-in" Chairman Kauffman to further participate in this matter after the expiration of his term by commencing the hearing *ab initio* on all Charges I, II, III, IV and V on November 14, 1988, the last day that Chairman Kauffman can officially act as a member of the Board, and further to give Board Counsel a "second bite at the apple" since Board Counsel was not prevailing on the merits of Charges I and II.

WHEREFORE, it is submitted that the unique, bizarre and unheard of procedure ordered by the six member panel of the Board on October 11, 1988 and Mr. Keuch on October 24, 1988 violates respondent's state and federal constitutional rights not to be twice placed in jeopardy of punishment and prosecution, violates his state and federal constitutional rights to due process, equal protection of law and right to counsel, and to fundamental fairness, deprives respondent of any semblance of fair play and exacerbates the appearance of impropriety that has permeated this proceeding from its inception, as previously discussed in Respondent's Application For Disqualification of All Board Members and in Respondent's Applications for Writ of Prohibition, Extraordinary Relief and Stay of Proceedings filed in the Supreme Court of Pennsylvania on July 29, 1988 (which Applications and Responses are incorporated herein by reference); it is respectfully requested, therefore, that Charges I and II be dismissed with prejudice.

VI. APPLICATION TO DISMISS ALL CHARGES ON GROUNDS OF PROSECUTORIAL MISCONDUCT

101. On or about June 15, 1988, respondent filed the aforementioned Application for Disqualification of All Members of the Judicial Inquiry and Review Board alleging, inter alia, that:

> participation in this matter against respondent by the current members of the Board, individually and collectively, has deprived and will continue to deprive respondent of his due process right to a fair hearing before a fair and impartial tribunal and of his civil and constitutional rights under the Constitution of the

United States, the Pennsylvania Constitution, and applicable federal and state statutes. . .

102. On June 29, 1988, said Application for Disqualification was denied by "eight members of the Board, excluding Judge Ross," and the Order Denying Application For Disqualification was executed by "Robert L. Keuch, Executive Director and General Counsel," who serves as the prosecutor for the Board.

103. On July 27, 1988, respondent filed in the Supreme Court of Pennsylvania, Eastern District, the aforementioned and incorporated Applications for Writ of Prohibition, Extraordinary Relief, and Stay of Judicial Inquiry and Review Board Proceedings alleging, inter alia, that the makeup and composition of the Board necessarily and improperly results in excessive commingling of prosecutorial and adjudicatory functions including the wearing of "two hats," as prosecutor and adjudicator, by the Executive Director of the Board and its General Counsel, Mr. Keuch.

104. As previously noted, Mr. Keuch has signed orders for and by the Board on numerous occasions, including the granting of a continuance on July 5, 1988 (a copy of which is attached hereto as Exhibit P); the denying of respondent's Application for Disqualification (a copy of which is attached hereto as Exhibit Q); the filing of the so-called "Amended Charges" on October 3, 1988 (Exhibit A); the setting of a time period of only three days within which to answer said charges (Exhibit B); the denial on October 20, 1988 of counsel for respondent's request for an extension of time to file a written answer (Exhibit G); and the issuing of the Notice of Hearing on October 24, 1988 (Exhibit J); and the issuing of the order of October 31, 1988 denying all of respondent's requests for relief set forth in his Supplemental Omnibus Application (Exhibit I); thus Board Counsel Keuch, who acts as prosecutor for the Board, repeatedly operates in a judicial capacity and performs adjudicative functions simultaneously and in addition to prosecutory functions.

105. As set forth in paragraphs 60 and 61 herein and in the Notes of Testimony for September 12-13, 1988 at 1204-16, 1441-96, and in the presentation of the proposed "Amended

Charges" III, IV and V, respondent has been seriously prejudiced in this matter by the *ex parte* presentation by Board Counsel Keuch of the highly inflammatory, irrelevant extraneous matters to the eight sitting members of the Board, including the three member hearing committee, in the middle of the proceedings at Board Matter Number 140.

106. As demonstrated by these incidents and events, the commingling of prosecutorial and adjudicatory functions, and the constitutional shortcomings inherent in the current Judicial Inquiry and Review Board system have been magnified and exaggerated throughout these proceedings by the unique circumstances of this case peculiar to respondent, to his severe and everlasting prejudice.

107. As Mr. Keuch stated on October 10, 1988, the "most important reason" for the existence of the Judicial Inquiry and Review Board and the procedures mandated by the Constitution, the Consolidated Statutes, and Board Rules "is to protect the integrity of the judicial system." Notes of Testimony, October 10, 1988 at 76.

108. To date in the proceedings at Board Matter Number 140 (ostensibly designed "to protect the integrity of the judicial system") we have witnessed the following: a sudden "rush to judgment" and hastily scheduled hearings after more than a year of Board investigation; sworn allegations of attempts to suborn perjury, obstruct justice and coerce witnesses, *see* affidavit of Nikolai Zdrale attached as Exhibit R, with no investigation or efforts by the Board to determine the validity of said allegations or referral to law enforcement agencies; continual and extensive commingling of prosecutorial and adjudicatory functions far beyond those inherent and inevitable in the Judicial Inquiry and Review Board system itself; discovery violations of "*Jencks*" and "*Brady*" requirements and the rules of fair play; the unnecessary, bad faith introduction of highly prejudicial, irrelevant matter polluting the proceedings beyond repair; the erroneous denial of respondent's right to confront and to impeach the credibility of his accuser by use of said accuser's felony convictions for nationwide criminal conspiracy to distribute cocaine through the Federal Express system; one judge member of the Board, designated as Chairman of the hearing committee in this proceeding, inexplicably resigning

his office six days before hearings were scheduled to commence, with no replacement forthcoming to fill the vacancy; two judge members of the Board recusing themselves in all matters involving respondent because they are material witnesses as to Charge I only whose testimony flatly contradicts each other's on a key issue of credibility; continual, massive, detailed leaking of confidential information which can only come directly from the Post-Gazette's and Inquirer's "sources on the Board" without any attempt (such as evidentiary hearings) to discover the source and plug the leak; an attempt by Mr. Keuch to coerce respondent into waiving the protection afforded by Rule 4 which requires twenty days notice prior to a formal hearing; numerous actions and orders being taken for "the Board" in derogation of constitution, statute and Rule by deficient panels of the Board and/or Mr. Keuch even though "the board shall act only with the concurrence of a majority of its members"; and the extraordinary, unprecedented and unheard of procedure whereby only three members of the Board (including Chairman Kauffman who has previously stated he would do everything in his power to have respondent removed from the bench) file vague "Rule 8 Amended Charges" over Mr. Keuch's signature, and thereafter employ the disingenuous legal fiction of "deeming" said charges to have been "Rule 2 charges" even though Rule 2 procedures have been utterly ignored, and setting illegal and constitutionally deficient periods of time within which to file a written answer and to notify respondent of the date set for hearing in order to ensure Chairman Kauffman's continued participation in these proceedings by aborting the extensive proceedings that have already caused enormous expenditures of time, energy, and personal and financial resources to respondent and were proceeding favorably to him, and illegally ordering hearings on the consolidated charges *ab initio* before a six member panel of the Board, including Chairman Kauffman, on the last day that Chairman Kauffman can officially act as his term of office expires on November 15, 1988 at 12:01 a.m., the first time in history that more than three members of the Board have participated on a hearing committee; and an attempt to deprive respondent of counsel of his choosing by the deliberate scheduling of hearings at a time when the proceedings were to

have been completed and counsel for respondent was scheduled to represent a defendant in a major federal criminal prosecution, of which the Board and its prosecutor were well aware (*see* section VIII, *infra*).

109. Rather than protecting the integrity of the judicial system, the instant proceedings have become a travesty of justice and have deprived and continue to deprive respondent of significant procedural and substantive rights derived from the State and Federal Constitutions, the Consolidated Statutes of the United States and of this Commonwealth, the Rules of Procedure Governing the Judicial Inquiry and Review Board, and traditional notions of fundamental fairness, fair play and justice.

WHEREFORE, for all of the foregoing reasons, respondent requests the Supreme Court to dismiss all Charges against respondent, with prejudice, on the basis of excessive and impermissible commingling of prosecutorial and adjudicatory functions, prosecutorial misconduct, overreaching and bad faith which has resulted in repeated and continual violations of the rights to due process of law, to equal protection of law, to confront one's accusers, and to not be twice placed in jeopardy of punishment and prosecution, which rights are guaranteed by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth.

VII. APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER TO "AMENDED/REAPPROVED CHARGES" III, IV AND V

110. As previously set forth, the Board can act "only with the concurrence of a majority of its members" (i.e., five members) and its members "shall consist of" two Superior Court judges, three Common Pleas judges from different judicial districts, two lawyers and two laypersons. Article V, section 18(a) and (b) of the Pennsylvania Constitution; 42 Pa. C.S.A. sections 2102-03.

111. It is undisputed that the order of October 3, 1988 erroneously purporting to be an "Amendment" to the Formal Charges "pursuant to Rule 8," and attempting to add Charges III, IV and V to Board Matter 140 as "Amended Charges," was

acted upon by only three members of the Board consisting of one Superior Court judge, one lawyer and one layperson.

112. Accordingly, the October 3, 1988 action and "Amended Charges" of the Board are unconstitutional, illegal and null and void, and are of no legal effect whatsoever.

113. The order of October 11, 1988 is also illegal, unconstitutional and in blatant violation of the Supreme Court's Rules of Procedure Governing the Board, as is set forth fully in preceding sections.

114. The Notice of Hearing of October 24, 1988 is also illegal, unconstitutional and in blatant violation of the Supreme Court's Rules of Procedure Governing the Board, as is set forth fully in preceding sections.

115. As set forth more fully in the preceding sections, the order of October 11, 1988 was upheld by the Board over respondent's objections; even starting at that point, therefore, i.e. October 11, 1988 (without conceding that said order of October 11th was valid), the time set therein for respondent to file a written answer on or before October 24, 1988 to Charges III, IV and V, is manifestly unreasonable, illegal and unconstitutional, for the following reasons:

(a) The order of October 11, 1988 resurrects the eight day period between October 3, 1988 and October 11, 1988, even though the October 3, 1988 "Amended Charges" were and are null and void and of no legal effect whatsoever, and retroactively and illegally posits that eight day period into the twenty day period required by Rule 2(b) within which respondent may file a written answer;

(b) The eight day period between October 3-11, 1988 was consumed by respondent and by counsel for respondent in preparation for and participation in the conferences on October 5, 8 and 10, 1988;

(c) The order of October 11, 1988 ignores and retroactively takes-back the assurances given to respondent and his counsel by Mr. Keuch that the time for filing an answer to the October 3, 1988 Charges III, IV and V would be tolled or suspended pending disposition of respondent's objections and the legal issues concerning same, which resolution (illegal and invalid) did not take place until October 11, 1988.

(d) The order of October 11, 1988 "deeming" the

"Amended Charges" of October 3, 1988 to have been "correctly and properly issued" as of October 3, 1988 also deprives respondent of the additional time allotted and required by Rule 1(b) to afford respondent a "reasonable opportunity in the course of the investigation to answer and to present such matters as he may choose" before the Board may file a Notice of Institution of Formal Proceedings;

(e) The vagueness and lack of specificity of the "Amended/Reapproved Charges" III, IV and V renders it impossible to file an intelligent response to said charges, and requires extensive and intensive research and investigation merely to determine what cases, times, dates, judges and proceedings to which these nebulous charges refer;

(f) The time necessary and appropriate for the filing of the Supplemental Omnibus Application challenging the validity of the October 11, 1988 "Reapproved Charges" and the time which elapsed pending disposition of said Application cannot be counted against respondent regarding the twenty days required by Rule 2(b) within which to file a written answer to said charges, *see* Pa. R.Civ.Pro.Rule 1028(d) ("If the preliminary objections are overruled, the objecting party shall have *the right to plead over* within twenty (20) days after notice of the order or within such other time as the court shall fix.");

(g) Additionally, whereas respondent, a member of the Pennsylvania Supreme Court, and his counsel had May-August, 1988, the relatively "slow" summer period for the Court, to prepare an answer and defense to the original Charges I and II, the Court is currently emeshed in the heart of its "busy" season, having just completed oral arguments and opinion assignments on September 26-30, 1988 in Pittsburgh, and on October 24-28, 1988 in Philadelphia, and with oral arguments/opinion assignments scheduled in Philadelphia December 5-9, 1988, and January 17-20, 1988.

(h) The Notice of Hearing of October 24, 1988 deprives respondent of one day of the twenty days notice prior-to-hearing to which he is absolutely entitled under Rule 4.

WHEREFORE, in the event that the Supreme Court denies respondent's requests for relief set forth herein and upholds the validity of "the Board's" orders of October 11, 24, and 31, 1988 over objections, respondent requests an extension of time

as of right, at least until February 1, 1989, to file a written answer to the "Reapproved Charges" III, IV and V.

VIII. APPLICATION TO DISMISS FOR VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL GUARANTEED BY STATE AND FEDERAL CONSTITUTIONS

116. As previously set forth in paragraph 15, the Board through its prosecutor, Mr. Keuch, the hearing committee and counsel for respondent had agreed upon and established a hearing schedule which would have completed the hearing proceedings at Board Matter Number 140 on or before October 21, 1988.

117. As previously set forth in paragraph 16, counsel for respondent, in reliance upon said agreement and established schedule, committed himself to represent a defendant in a major federal criminal prosecution commencing on October 24, 1988 in the United States District Court for the Eastern District of Pennsylvania in a case involving four other defendants and their lawyers from New York and over 100 government witnesses, which is expected to take two months without possibility of continuances; the trial court specifically denied counsel for respondent's request for a continuance in that federal prosecution.

WHEREFORE, the actions and orders of the illegal and unconstitutional three and six member panels of the Board, and of Mr. Keuch for the Board, in requiring respondent to answer the illegal and unconstitutional additional Charges III, IV and V on or before October 24, 1988, and the illegal and unconstitutional setting by Mr. Keuch of a hearing date of November 14, 1988, deprives respondent of his state and federal constitutional guarantees of counsel of his own choosing, as well as his guarantees of due process and equal protection of law, and is a manifest abuse of the discretion that the Board possesses to grant continuances and extensions of time to accomodate the reasonable requests of a respondent judge and his attorney. *See, e.g. Maine v. Moulton*, 474 U.S. 159, 170-71 (1985) ("Once the right to counsel has attached and been asserted, the State must of course honor it. . . . The Sixth Amendment also imposes on the State an affirmative obligation

to respect and preserve the accused's choice to seek this assistance. . . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."); *Commonwealth v. Ross*, 465 Pa. 421, 427-28, 350 A.2d 836 (1976) (trial court infringed on defendant's right to counsel of his own choice when it refused to grant continuance for purpose of obtaining representation by counsel of his choice); *Budget Laundry Company v. Munter*, 450 Pa. 13, 298 A.2d 55 (1972) (failure of trial court to grant reasonable request for continuance to allow civil litigants opportunity to be represented by counsel of their own choosing where said counsel was also trial counsel in a conflicting federal court proceeding at time was a manifest abuse of discretion); respondent therefore requests the Supreme Court to vacate the orders of October 3, 11, 24, and 31, 1988 and to stay any and all further proceedings at Board Matter Number 140 until chosen counsel for respondent, A. Charles Peruto, is available to represent respondent in said proceedings.

IX. APPLICATION FOR RELIEF

118. Respondent incorporates by reference the factual averments and renews the various requests for relief set forth in the initial Applications for Relief filed in the Supreme Court at JIRB Docket No. 138 on July 29, 1988.

119. Paragraphs 1-117 of the instant Second Applications for Writ of Prohibition and for Extraordinary Relief are incorporated herein by reference along with the various requests for relief set forth therein; respondent supplements the Initial Applications filed in the Supreme Court on July 29, 1988 with the averments and requests for relief set forth therein.

X. JURISDICTION

120. The Supreme Court may assume plenary jurisdiction of this matter under its King's Bench powers, recognized at 42 Pa.C.S. § 502 and Pa. R.App.Pro.Rule 3309, to correct a grevious abuse of discretion, authority and jurisdiction by the Board which has continually and flagrantly violated its

own rules of procedure, has deprived respondent of significant procedural and substantive rights guaranteed respondent by the Constitutions and Consolidated Statutes of the United States and of this Commonwealth, including the rights to due process equal protection of law, the right to counsel, the right not to be twice placed in jeopardy of punishment or prosecution for the same offense, and in derogation of traditional notions of fundamental fairness, justice and fair play, and the right to adjudication before the full nine member complement of the Board consisting of two Superior Court judges, three Common Pleas Court judges, two lawyers and two laypersons, all of which demonstrates that the Board in this case has acted without and beyond its jurisdiction. *See Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 507 Pa. 193, 489 A.2d 1286 (1985) and *Reilly by Reilly v. SEPTA*, 507 Pa. 204, 218, 489 A.2d 1291 (1985).

121. The Supreme Court may grant a writ of prohibition, pursuant to 42 Pa.C.S. § 721(2) and Pa.R.A.P. 3307, prohibiting each and every member of the Board from any further participation in this matter, for the reasons set forth in paragraph 120. *Municipal Publications, Inc.*, *supra* and *Glen Mills Schools v. County of Common Pleas of Philadelphia County*, 513 Pa. 310, 520 A.2d 1379 (1987);

122. The Supreme Court, generally, has jurisdiction and supervisory authority over inferior tribunals within the unified judicial system, which includes the Judicial Inquiry and Review Board, and inherent authority to correct abuses of the authority and jurisdiction vested in said tribunals. Pa. Const. Article V, sections 1, 2 10(a) and (c), 18, and Schedule, section 24; 42 Pa.C.S. §§ 502 and 503; Pa. Rules of Judicial Administration, Rule 701.

WHEREFORE, the Supreme Court of Pennsylvania has jurisdiction to entertain the instant Second Applications for Writ of Prohibition and for Extraordinary Relief, and to grant respondent's requests for relief set forth therein.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

ss:

Before me, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing SECOND APPLICATION FOR WRIT OF PROHIBITION AND SECOND APPLICATION FOR EXTRAORDINARY RELIEF are true and correct to the best of his knowledge, information and belief.

ROLF LARSEN
Rolf Larsen

SWORN to and subscribed
before me this 2nd day
of November, 1988.
BERNADETTE M. SEIBERT
Notary Public

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

NOTICE TO PLEAD

You are hereby notified to file a written response (answer) to the averments set forth in the enclosed Amendments to Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief. Failure to file such a written response (answer) to said averments set forth in said Amendments shall be deemed to be an admission of the averments set forth therein and a stipulation that respondent is entitled to the relief requested.

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Petitioner

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

JIRB Docket No. 138

AMENDMENTS TO SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF

AND NOW comes Rolf Larsen, respondent at Judicial Inquiry and Review Board Matter Number 140 (Supreme Court Docket No. 138), through his counsel, A. Charles Peruto, Esquire, who files the following Amendments to respondent's Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief (hereinafter "Second Applications"), and setting forth additional requests for relief:

XI. APPLICATION FOR DECLARATORY JUDGMENT

123. On November 3, 1988, respondent filed the said

Second Applications with the prothonotary of the Eastern District in the Supreme Court of Pennsylvania.

124. On November 4, 1988, respondent presented an Application for Stay to a Single Justice of the Supreme Court of Pennsylvania pursuant to Pa.R.App.Pro. Rule 123(e) (a copy of which is attached hereto as Exhibit S) to Mr. Justice Nicholas P. Papadakos requesting, inter alia, a stay of proceedings at Board Matter Number 140; oral argument took place in Mr. Justice Papadakos' chambers on that date, at which time respondent was represented by counsel John H. Bingler, Esquire, and the Board by Executive Director and General Counsel Keuch. Mr. Bingler was retained to represent respondent on this Application to Stay to a Single Justice due to the unavailability of counsel, A. Charles Peruto, who is and was representing a criminal defendant in a major federal trial in the United States District Court for the Eastern District of Pennsylvania, as is set forth fully in respondent's Second Application, paragraphs 15-16, 116-117 section VIII.

125. On November 7, 1988, Mr. Justice Papadakos issued an order (a copy of which is attached hereto as Exhibit T) stating as follows:

> AND NOW, this 7th day of November, 1988, *the Notice of Hearing* (J.I.R.B.R.P. 4), *dated the 24th day of October, 1988 is set aside and all proceedings* before the Judicial Inquiry and Review Board at Board Matter 140 are *stayed until further order of this Court*. (Emphasis added).

Said order of November 7, 1988, in plain and unambiguous language (a) set aside the Notice of Hearing of October 24, 1988, and (b) stayed all further proceedings.

126. On November 10, 1988, a majority of the Supreme Court of Pennsylvania issued the following order (a copy of which is attached as Exhibit U):

ORDER

PER CURIAM:

AND NOW, this 10th day of November, 1988, it is hereby ordered:

(1) that *the stay entered on November 7, 1988, by Mr. Justice Papadakos is hereby vacated*;

(2) that the decisions on the Second Application for Leave to File Original Process Pursuant to Pennsylvania Rules of Appellate Procedure Rule 3307 and the Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief are deferred pending receipt of further answer by counsel for the Board.

Mr. Justice Larsen did not participate in the consideration or decision of this matter.

Mr. Justice Zappala and Mr. Justice Papadakos dissent to the vacation of the stay.

Dissenting opinion may follow. (Emphasis added.) [Note: Mr. Justice Papadakos did file a dissenting opinion, a copy of which is attached hereto as Exhibit V.]

127. The Supreme Court's order of November 10, 1988, in plain and unambiguous language, only vacates Mr. Justice Papadakos' stay order, and leaves intact that portion of Mr. Justice Papadakos' order which set aside the October 24, 1988 Notice of Hearing setting a hearing for November 14, 1988.

128. On November 10, 1988, Board Counsel Keuch sent (by hand-delivery to Mr. Peruto, and by telefax delivery to Mr. Bingler and to respondent), a letter (a copy of which is attached hereto as Exhibit W) advising Mr. Peruto that "the temporary stay issued by Justice Papadakos in this matter on November 7, 1988 has now been lifted. Therefore, the hearing

scheduled for November 14 1988 in this matter will be held." Additionally, this letter of November 10, 1988 advises Mr. Peruto that "the first order of business at the hearing will be the consideration of any motions you wish to make and the consideration of any request you and/or your client deem necessary for extensions of time . . . to prepare a defense to the charges." Mr. Peruto was further advised that "the Board, at the hearing on November 14, 1988, will also consider any request you or your client deem necessary for an extension based on [unavailability of counsel Peruto]. I [Keuch] have been authorized to inform you that *any reguests for additional time . . . will be granted by the Board.*"

129. On November 10, 1988, respondent, through counsel James J. Powell, III, Esquire, filed in the United States District Court for the Middle District of Pennsylvania a Complaint for temporary restraining order, preliminary injunction and permanent injunction, and a Motion for Temporary Restraining Order, seeking, inter alia, to enjoin the Board from any further proceedings at Board Matter Number 140.

130. Oral argument was held on November 14, 1988 on the Motion for Temporary Restraining Order before the Honorable William W. Caldwell, at which respondent was represented by Mr. Powell due to the continued unavailability of Mr. Peruto and the Board was represented by Board Counsel Keuch.

131. On November 14, 1988, Judge Caldwell denied respondent's Motion for Temporary Restraining Order, primarily (as deduced from and evidenced by the concerns expressed by Judge Caldwell from the bench) because of the perceived availability of relief in the Supreme Court of Pennsylvania which had deferred decisions on respondent's Second Applications "pending receipt of further answer by counsel for the Board."

132. On November 14, 1988, oral argument took place in Harrisburg before four members of the Board only, namely Chairman Kauffman, Judge Munley, Mr. Hoyle and Mrs. Scarlata; Mr. Kauffman was the chairman of this four member panel; although scheduled to sit as members of the unique six member panel to hear Charges I-V *ab initio*, Judge Montemuro and Mr. Higgins were not present at this proceeding on November 14, 1988; moreover, there were no witnesses present at or subpoenaed for this proceeding and Board

Counsel Keuch did not present any evidence or testimony and was not prepared to do.

133. After preliminary statements by Board Counsel Keuch, Chairman Kauffman declared: "Well, then, these hearings are open and in progress now, and, Mr. Powell, do you have some motions to make, sir?" N.T. November 14, 1988 at 1812-13. (A copy of the notes of testimony of this proceeding on November 14, 1985 is attached hereto as Exhibit X.)

134. Mr. Powell appeared at this proceeding on November 14, 1988 on behalf of respondent, due to the continued unavailability of counsel, Mr. Peruto. Mr. Powell stated "I've been hired for the limited purpose of placing certain objections on the record here today," *id.* at 1813, and he made the following applications:

(a) an application to dismiss said proceeding on the grounds that the Notice of Hearing of October 24, 1988 gave only nineteen days notice to respondent prior to hearing, rather than the mandated twenty days notice under Rule 4 (see paragraphs 55 and 100 of Second Applications);

(b) an application to dismiss said proceeding on the grounds that Mr. Justice Papadakos had "set aside" the Notice of Hearing of October 24, 1988, and the Supreme Court's order of November 10, 1988 did not vacate or reverse that portion of Justice Papadakos' order, nor did it otherwise reinstate the Notice of Hearing of October 24, 1988; hence, the proceeding of November 14, 1988 was not noticed, as required by Rule 4;

(c) a renewal of the various applications made in respondent's previous Supplemental Omnibus Application filed with the Board, and summarily denied by Board Counsel Keuch on October 31, 1988 without answer or response to any of the averments, allegations or requests set forth therein; said Supplemental Omnibus Application included challenges to the composition of the Board and to its taking any action with less than the constitutionally and statutorily mandated majority of the members of the Board, i.e. five members of a Board consisting of the full complement of nine members (five judges, two lawyers and two laypersons);

(d) an application to admit Mr. Peruto's trial schedule into the record (a copy of which is attached hereto as Exhibit Y, along with respondent's letter of November 10, 1988 to

attorney Powell), which establishes Mr. Peruto's unavailability to represent respondent in the instant proceedings through January, 1988, due to his heavy schedule of trials, some of which had already been continued in order to accomodate the proceedings at Board Matter Number 140 which had been scheduled to be completed on or before October 21, 1988; as demonstrated by Exhibit Y, Mr. Peruto is committed to twenty trials between November 21, 1988 - January 27, 1989, including five in which Mr. Peruto is "attached" by order of the trial judge.

135. Mr. Powell and Board Counsel Keuch orally argued for and against, respectively, Mr. Powell's various applications; during oral argument, Board Counsel Keuch presented certain false and/or misleading factual, unsworn testimony and argument to the Board, namely:

(a) (1) That "as the record will show, the prior hearings in this matter were continued, to be resumed on October 10, 1988. During the period the hearings were suspended, however, the Board on October 3rd, 1988 authorized additional charges three, four and five in this matter . . ." N.T. at 1811.

(2) This was false and/or misleading because: the record will show that prior hearings in this matter were not "suspended" on October 3, 1988 but had merely been continued, and had been scheduled to recommence on October 5, 1988 (not October l0th); furthermore, "the Board" did not authorize "additional charges three, four and five" on October 3, 1988, but rather, only Chairman Kauffman, Judge Montemuro and Mrs. Scarlata attempted to add said charges on October 3rd.

(b) (1) That "a notice of this hearing was hand delivered to respondent's counsel on October 24th, the day in which his time for filing an answer expired," N.T. at 1816.

(2) This was false and/or misleading because: a notice of hearing was hand delivered to Mr. Peruto's *office* on October 24, 1988, but it was not delivered to Mr. Peruto on that date; in fact, as he was emersed in federal court proceedings, he did not receive or see said notice until the morning of the *following* day; furthermore, Board Counsel Keuch's statement is misleading in implying that the notice of hearing was entered and hand delivered *after* the time for filing an answer

on October 24th had expired when, in fact, the notice of hearing was delivered to Mr. Peruto's office some ten-eleven hours *before that time had expired.*

(c)(1) That "his counsel had notice, and that is the practice we have followed . . . that matters be served on the respondent, as required by the rules, but that copies be also served upon him [counsel] in his office, and we have done that." N.T. at 1816.

(2) This was false and/or misleading because: it was never agreed, as Board Counsel Keuch represented, that service on counsel would be service on respondent for purposes of the Board's Rules; to the contrary, Board Counsel Counsel Keuch specifically informed Mr. Peruto by letter of March 31, 1988 (a copy of which is attached hereto as Exhibit Z) that the Rules require service be made upon the respondent, but that service upon Mr. Peruto as representative would be acceptable if respondent executed a written waiver of the Rules requiring personal service upon respondent; respondent did not agree to such an arrangement for substitute service nor did he execute such a waiver of the requirements for personal service; hence, service upon Mr. Peruto would not and does not constitute service upon respondent.

(d)(1) That Mr. Justice Papadakos' "stay order, which, of course, includes the entire order, was vacated . . ." by a majority of the Supreme Court, N.T. at 1817.

(2) This was false and/or misleading because: only that portion of Mr. Justice Papadakos' order of November 7, 1988 staying further proceedings was vacated by the Supreme Court majority's clear and unambiguous order of November 10, 1988, which leaves intact that portion of Mr. Justice Papadakos' order which clearly and explicitly states that "the Notice of Hearing (J.I.R.B.R.P. 4), dated the 24th day of October, 1988 is set aside . . .."

(e)(1) That respondent had received the requisite twenty days prior notice (required by Rule 4) of the November 14, 1988 proceeding, N.T. at 1816.

(2) This was false and/or misleading because: respondent received only nineteen days notice prior to the proceedings of November 14, 1988 because he did not receive notice until October 25, 1988 and the proceeding on No-

vember 14, 1988 began on the twentieth day of the required twenty day period, thus depriving him of one day of the twenty day *notice prior to hearing* mandated by Rule 4, *see also* paragraphs 55 and 100 of Second Application.

136. Attorney Powell was placed at a serious disadvantage at the proceeding on November 14, 1988 because he did not have the knowledge or information set forth in paragraph 135 to specifically refute the inaccurate, false and/or misleading factual averments and representations made in Board Counsel Keuch's presentation based on his Keuch's unsworn "testimony" which averments and representations would have been specifically refuted by respondent's counsel of choice, Mr. Peruto, thus further interfering with respondent's right to counsel of his own choosing.

137. Additionally, during the proceedings on November 14, 1988, Chairman Kauffman critically questioned Mr. Peruto's trial schedule (Exhibit Y), and stated "I assume that he has someone else in his office to cover some of these, because he obviously can't be on trial in the present trial and attend the November 21st Commonwealth against McQuillan or Commonwealth against Kendrick or the November 30th Commonwealth against Kendrick." N.T. at 1819.

138. It is improper for any Board member to *assume* any fact not of record, and it was improper for Chairman Kauffman to "assume that [Mr. Peruto] has someone else in his office to cover some of these;" in point of fact, Mr. Peruto was able to have the case of Commonwealth v. McQuillan continued on November 21, 1988 (no new date has yet been set) and has managed to have the November 21, 1988 Commonwealth v. Kendrick case handled by another attorney, although as Mr. Peruto is a sole practitioner, it is not his customary practice to secure substitute counsel "to cover" cases nor is it always possible to do so; moreover, any case for which Mr. Peruto is able to secure a continuance in November, December or January will obviously be rescheduled as soon as possible (most likely in January, February, 1989).

139. Chairman Kauffman's active intervention and false factual assumptions of November 14, 1988 further disadvantaged respondent and implicates his right to counsel since attorney Powell did not have the personal knowledge or the information

to refute the Chairman's false assumption which knowledge and information Mr. Peruto would have and did possess.

140. Chairman Kauffman, for the four members participating in the proceeding on November 14, 1988, unilaterally and summarily denied respondent's various applications (but for the admission of Mr. Peruto's trial schedule which was admitted).

141. Chairman Kauffman then *sua sponte* declared a continuance of the proceedings at Board Matter Number 140 (without request by Mr. Powell), and established a hearing schedule of January 5-6, 1989, January 9-13, 1989, if necessary, and January 16-18, 1989, if necessary; in addition to conflicting with Mr. Peruto's trial schedule, the Supreme Court of Pennsylvania is in session in Philadelphia January 17-20, 1988.

142. Additionally, Chairman Kauffman directed Mr. Peruto to advise Board Counsel Keuch on or before December 23, 1988 as to what portions of the record of the aborted proceedings at Board Matter Number 140, if any, Mr. Peruto agreed to have incorporated into the hearings *ab initio* before six members of the Board on consolidated Charges I-V.

WHEREFORE, respondent requests this Court to issue the following additional relief in the nature of a declaratory judgment:

(a) To declare the November 14, 1988 "hearing" before four members of the Board null and void and of no legal effect because of the failure of the Board in its order of October 24, 1988 to give respondent the full twenty days prior notice as required by Rule 4; because of the failure of the Board to provide *any* Notice of Hearing of the "hearing" of November 14, 1988, as Justice Papadakos' order setting aside the Notice of Hearing of October 24, 1988 was not reversed or vacated by a majority of the Supreme Court, and is still in effect; and because the "hearing" was before an unconstitutional and illegal four member panel of the Board.

(b) To declare that there was not a "hearing in progress" on November 14, 1988 because: prior orders of the Board on October 11, 1988 and October 24, 1988 had, respectively, initially suspended all proceedings at Board Matter Number 140, and then finally aborted all previous proceedings at Board Matter Number 140; the Notice of Hearing of October 24,

1988 setting a hearing date of November 14, 1988 failed to provide respondent with the full twenty days notice prior to hearing required by Rule 4; there was *no notice of hearing* provided to respondent as required by Rule 4 because the order of Mr. Justice Papadakos of November 7, 1988 "set aside" the Notice of Hearing of October 24, 1988 and that portion of said order of November 7, 1988 was plainly not affected by the Supreme Court's order of November 10, 1988; and because the proceeding of November 14th was a sham proceeding intended only to create the transparent appearance that a hearing had commenced in order to "lock-in" Chairman Kauffman and Mr. Higgins (both of whose terms of office expired on November 15, 1988 at 12:01 a.m.) to participate in the proceedings at Board Matter Number 140, as demonstrated by the fact that only four of the six members appeared for the sham "hearing" unprepared to hear or accept evidence or testimony, and the fact that Chairman Kauffman immediately *sua sponte* declared a continuance of the proceedings until January 5, 1989.

(c) To declare that, in the event the Supreme Court determines that a hearing was "in progress" in Board Matter Number 140 on November 14, 1988, Mr. Higgins was not a member of such a "hearing in progress" on that date due to his absence;

(d) To declare that the terms of office of Messrs. Kauffman and Higgins have expired as of November 15, 1988, and that as neither was a member of "any hearing in progress at the end of his term," to declare that both are prohibited from any further participation in any proceedings against respondent at Board Matter Number 140.

XII. APPLICATION TO DISMISS FOR VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL GUARANTEED BY STATE AND FEDERAL CONSTITUTIONS

143. The additional facts set forth in paragraphs 123- 142 herein supplementing respondent's Second Applications are hereby incorporated by reference (which additional facts include that counsel, Mr. Peruto, was unavailable for the proceedings on November 4, 10 and 14, 1988 and that he will

remain unavailable at least through January, 1989) further demonstrate the Board's and Board Counsel Keuch's willful and deliberate interference with and deprivation of respondent's right to counsel of his own choosing and the prejudice caused thereby.

WHEREFORE, the actions and orders of the illegal and unconstitutional four member panel of the Board chaired by Chairman Kauffman, and the actions of Board Counsel Keuch, on November 14, 1988 deprive respondent of his state and federal constitutional guarantees of counsel of his own choosing, as well as his guarantees of due process and equal protection of law; respondent therefore requests the Supreme Court to vacate the actions of the four member hearing panel on November 14, 1988 and to stay any and all further proceedings at Board Matter Number 140 until A. Charles Peruto is available to represent respondent.

XIII. APPLICATION TO DISQUALIFY CHAIRMAN KAUFFMAN AND ALL MEMBERS OF JUDICIAL INQUIRY AND REVIEW BOARD

144. Respondent has previously asked each of the Board members to disqualify themselves from these proceedings, and has asked the Supreme Court to disqualify each of the Board members, based, inter alia, on allegations that Chairman Kauffman was and is biased and hostile towards respondent and has prejudged all matters against respondent. *See* paragraphs 118-19 of Second Applications, incorporating and reiterating the averments and requests set forth in respondent's Initial Applications in the Supreme Court.

145. Respondent has alleged, in paragraphs 24 and 25 of said Initial Applications, that

> 24. During his term as a member and Chairman of this Board, Chairman Kauffman has actively, directly and indirectly, supported the candidacy of various political candidates for political office, including statewide judicial offices, in clear contravention of Canon 7 of the Code of Judicial Conduct, which provides that an officer of a judicial system performing

judicial functions should refrain from political activity inappropriate to his judicial office.

25. In his capacity as Chairman and Board member, Chairman Kauffman has never voted against any member of the judiciary that he has supported for judicial office.

146. The Board has failed to investigate or make inquiries into respondent's allegations concerning Chairman Kauffman's violations of these and other Canons of the Code of Judicial Conduct (Canons 1, 2 and 3A(4)) despite the explicit declaration by Board Counsel Keuch on behalf of the full Board that: "The rules of the Judicial Inquiry and Review Board and the Pennsylvania Constitutional provisions relating to the Board [i.e., Article V, sections 17 and 18] apply equally to all members of the Board." Brief for Board as Amicus Curiae In Support of Robert B. Surrick, Esquire, at Supreme Court Disc. Dkt. No. 2 No. 508, J-186-1988, at 7.

147. On November 7, 1988, Chairman Kauffman, with other members of the Pennsylvania Jewish Campaign Committee, caused to be printed in the Pittsburgh Press and other newspapers a full page paid political endorsement on behalf of Republican candidates in the November 8, 1988 general election. (A reduced copy of said full page endorsement is attached hereto as Exhibit AA.)

148. Said paid Republican political endorsement by Chairman Kauffman also violated Canon 7 of the Canons of the Code of Judicial Conduct.

149. Respondent is a Democrat.

150. Chairman Kauffman's appointment of himself to chair the unique, unprecedented and bizarre six member hearing panel to hear consolidated Charges I-V *ab initio*, his appointment of himself to chair the four member panel presiding on November 14, 1988, and his actions and conduct of the proceedings on November 14, 1988 (including the making of false factual assumptions and the unilateral, summary dismissal of respondent's various applications) demonstrate his actual bias and hostility to respondent and the prejudice resulting therefrom.

151. Chairman Kauffman's actual influence and his potential to influence the other members of the Board, and his power to manufacture a result adverse to respondent in this proceeding, has significantly escalated throughout these proceedings: whereas initially Chairman Kauffman was one of nine members of the Board having its mandated complement of five judges, two lawyers ("Justice" Kauffman, as he is referred to by the Board and its Counsel, is actually one of the lawyer members of the Board) and two laypersons, and was not a member of the three member hearing panel chaired by Judge Munley, Chairman Kauffman now wields considerable additional power and authority by virtue of the facts that: three of the five judge members of the Board have removed themselves from these proceedings; all prior proceedings have been aborted by the actions of the Board initiated by Chairman Kauffman (along with Judge Montemuro and Mrs. Scarlata) in adding new Charges III, IV and V on October 3, 1988 in the midst of the proceedings at Board Matter Number 140; Chairman Kauffman's maneuvering himself into position to appoint himself Chairman of the unique, unprecedented and bizarre six member hearing panel to hear consolidated Charges I-V *ab initio* puts him in the position of maximum authority and discretion (which allows for maximum abuse of authority and discretion) over these proceedings as he is able now to make unilateral rulings on legal matters and applications (as he did on November 14, 1988) and to admit and exclude evidence in an insidiously biased manner.

152. The Board's failure to investigate respondent's allegations against Chairman Kauffman indicates the actual bias and hostility of the remaining members of the Board against respondent, their susceptibility to the influence of Chairman Kauffman, and the inability of this Board to give respondent an adjudication before a tribunal having the appearance of impartiality.

WHEREFORE, respondent renews his application to disqualify Chairman Kauffman, and each and every member of the Board who have been contaminated by Chairman Kauffman's participation in these proceedings both on the record and behind the scenes, and reiterates his claim that the participation to date and continued participation in the future by

Chairman Kauffman and the other remaining members of the Board has deprived and will continue to deprive respondent of his constitutional and statutory rights to be judged by a fair and impartial tribunal of five judges, two lawyers and two lay-persons, and of his constitutional and statutory rights to due process and equal protection of law, to confidential proceedings, to counsel of his own choosing, to not be twice placed in jeopardy of punishment or prosecution for the same offense, and to justice, fundamental fairness and fair play.

XIV. DIRECTION TO BOARD COUNSEL KEUCH

153. The Supreme Court of Pennsylvania has decreed that its decision on respondent's Second Application will be "deferred pending receipt of further answer by counsel for the Board."

154. The Supreme Court has not set a time within which counsel for the Board shall file such further answer, and hearings have now been scheduled to commence in this matter on January 5, 1989.

WHEREFORE, respondent requests this Court to direct Board Counsel Keuch to file specific written answers to each of the averments set forth in said Second Applications and the instant Amendments, and to issue an order of Court directing that said written answers be filed within twenty days therefrom, and at least thirty days prior to the commencement of any further proceedings at Board Matter Number 140.

Respectfully submitted,

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

AFFIDAVIT

OMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY

---

ss:

BEFORE ME, the undersigned authority, personally appeared ROLF LARSEN, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing AMENDMENTS TO SECOND APPLICATION FOR WRIT OF PROHIBITION AND/OR SECOND APPLICATION FOR EXTRAORDINARY RELIEF are true and correct to the best of his information, knowledge, and belief.

ROLF LARSEN
Rolf Larsen

Sworn to and subscribed
before me this 22nd day
of November, 1988.

BERNADETTE M. SEIBERT
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Amendments to Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief has been served on this date to the parties listed below by hand delivery in care of and addressed to Mr. Robert L. Keuch, Esquire, Executive Director and General Counsel of the Judicial Inquiry and Review Board at 225 Market Street, Harrisburg, PA 17101:

Judicial Inquiry and Review Board
Honorable Bruce W. Kauffman
Honorable Frank J. Montemuro, Jr.
Honorable James E. Rowley
Honorable James M. Munley
Honorable Eunice L. Ross
James H. Higgins
Lawrence T. Hoyle, Jr., Esquire
Antonia L. Scarlata
Robert L. Keuch, Esquire

A. CHARLES PERUTO

A. Charles Peruto
Attorney for Respondent

In The

Supreme Court of Pennsylvania

JUSTICE ROLF LARSEN

v.

COMMONWEALTH OF PENNSYLVANIA, JUDICIAL INQUIRY AND REVIEW BOARD, and its members, HONORABLE BRUCE W. KAUFFMAN, HONORABLE FRANK J. MONTEMURO, JR., HONORABLE JAMES E. ROWLEY, HONORABLE ALEX BONAVITACOLA, HONORABLE JAMES M. MUNLEY, HONORABLE EUNICE L. ROSS, JAMES H. HIGGINS, LAWRENCE T. HOYLE, JR., ANTONIA L. SCARLATA, and its Executive Director and General Counsel, ROBERT L. KEUCH

No. 138 Judicial Inquiry and Review Board Docket

ORDER

PER CURIAM:

AND NOW, this 21st day of December, 1988, upon consideration of the Second Application for Writ of Prohibition and/or Second Application for Extraordinary Relief, as amended, and the brief filed in opposition thereto, the Applications are hereby denied. *See First Amendment Coalition v. Judicial Inquiry and Review Board*, 501 Pa. 129, 460 A.2d 722 (1983); *Petition of Pennsylvania Bar Ass'n*, 501 Pa. 127, 460 A.2d 721 (1983); *see also Application of Surrick* ("XYZ" Case), 504 Pa. 25, 28-29, 470 A.2d 447, 448 (1983) (Zappala, J., concurring).

Mr. Justice Larsen did not participate in this matter.

Mr. Justice Zappala and Mr. Justice Papadakos dissent.

BEST AVAIL

with cust. corr. 5/10/93)

EDMUND B. SPAETH, JR.
207 Rex Avenue
Philadelphia, PA 19118
215-242-1291

March 3, 1990

The Honorable Robert P. Casey
Governor, State of Pennsylvania
The Capitol
Harrisburg, PA 17120

Dear Governor Casey:

I hereby resign as a member and Chairman of the Judicial Inquiry and Review Board. I do so because I have concluded that the structure of the Board is so fundamentally flawed that the Board cannot fulfill the responsibilities entrusted to it.

The basis of this conclusion is stated in the Report of the Governor's Judicial Reform Commission (of which, as you know, I was a member), submitted to you in January 1988. Four structural flaws in particular are identified in the Commission's Report.

First: As now consititued, the Board both investigates a complaint of misconduct by a judge and decides whether the complaint has merit. This is unfair both to the judge being investigated and to the Board. It is unfair to the judge because the judge cannot help but think that in deciding whether the complaint has merit, the Board will not confine itself to the evidence admitted at the hearing but will consider information learned in the course of the preliminary investigation but never offered at the hearing. It is unfair to the Board because no matter how resolutely the members of the Board seek to base their decision only on the evidence admitted at the hearing, they can do nothing to dispel the judge's suspicion or answer an allegation that they considered information learned in the course of the preliminary investigation. The Judicial Reform Commission therefore recommended (p. 87 of its Report) that the judicial discipline system should be reconstituted so that it is divided into two separate and independent parts: an

ABLE COPY

investigative division, within the executive branch, and an adjudicative division, within the judicial branch.

Second: The present combined investigative-adjudicative function of the Board might well raise a question whether its procedures were consistent with due process, except that a decision by the Board that judicial misconduct has occurred and a sanction should be imposed is recommendatory only; on appeal, the Supreme Court must conduct a de novo review, which is to say that the Court has the responsibility of making an independent review of the record created by the Board to determine for itself whether the charges have been established by clear and convincing evidence. The Board's recommendation has no binding effect on the Court but is merely advisory.

The usual rule in appellate proceedings is that an appellate court will defer to findings by the lower court, although of course it retains the power to set the findings aside because they are not supported by sufficient evidence or constitute an abuse of discretion. The reason for this rule is the common experience that one who sees a witness testify is in a better position to decide what weight to give that witness's testimony than one who only reads a transcript of the testimony. Not applying this rule to appeals in judicial discipline matters creates two difficulties than can only undermine public confidence in the efficiency and fairness of the judicial discipline system.

The first difficulty is that the importance of the Board's processes and decision is greatly diminished. No matter how conscientiously the Board attends to the evidence and formulates its recommendation, its findings and decision are entitled to no weight. The second difficulty is that the Supreme Court's de novo review may seem, at least to some, to be subjective. Where one justice may read a transcript as sufficient to establish the charges, another may read it as insufficient.

In recognition of these difficulties, the Judicial Reform Commission recommended (pages 105 & 110 of its Report) that the adjudicative division of the judicial discipline system should be required to file written decisions that include its findings of fact, conclusions of law, and discussion of reasons, and should be empowered to enter such order of removal from office, suspension, censure, or other discipline as authorized by the Pennsylvania Consititution and as warranted by the

record, and that on appeal, the Supreme Court should not review the record de novo but rather as it would review the record in a civil action in which the moving party has the burden of proving its allegations by clear and convincing evidence.

Third: As now constituted, the Board must conduct its operations in secrecy. It is only if the Board recommends a sanction that its record becomes public. This requirement of secrecy has been thought necessary to protect a judge against whom a complaint has been filed. It may, however, generate great suspicion as to whether the Board has conducted itself properly. Thus the Board is, so to speak, required to inflict its own wound. For if it concludes that no sanction should be recommended, it may prompt suspicions of misconduct; which because of its obligation of secrecy it is unable to respond to and allay. In recognition of this most unfortunate situation, the Judicial Reform Commission recommended (pages 98 & 105-06 of its Report) that in fairness to a judge against whom a complaint has been filed, all proceedings of the investigative division of the judicial discipline system should be confidential, unless and until a determination of probable cause is made and formal charges are filed, but that upon receipt of formal charges, the adjudicative division should schedule a hearing, which must be conducted in public. Justice Brandeis once observed that sunlight is the best disinfectant. Of no matter is that more true than of judicial discipline matters.

Fourth: The Board must conduct itself according to rules as promulgated by the Supreme Court. While of course the Board must conduct itself consistently with the Constitution and the Judicial Canons, if it is to fulfil its responsibilities it must be independent, able to conduct its proceedings in the manner that its experience demonstrates is appropriate to ensure both fairness and efficiency. The Judicial Reform Commission therefore recommended (pages 95, 103, 105, 106, and 112 of its Report) that the investigative division and the adjudicative division of the judicial discipline system should each have the power to promulgate its own rules of procedure; that each division should prepare and administer its own budget and hire staff as needed, the budget of the adjudicative division to be submitted to the General Assembly separately and not as an

item in the request by the Supreme Court on behalf of the judicial system generally; that the judicial discipline system should be assured by Constitutional provision that the General Assembly will appropriate sufficient funds to enable the prompt and fair adjudication of all complaints regarding judicial conduct; and that members of the Board, its chief counsel and staff should be absolutely immune from suit for all conduct in the course of their official duties.

It writing this letter I speak only for myself. I regret the conclusion that I have reached regarding the Board's ability to fulfill its responsibilities and any inconvenience my resignation may cause the Board. Perhaps I should have declined appointment to the Board, but that's hindsight — always sharper than foresight. I do not mean in any way to suggest any criticism of any member of the Board, or of its Executive Director and Chief Counsel, or of its staff. To the contrary, to my observation all of these individuals have conscientiously sought to fulfill the responsibilities imposed on them. It has been a privilege and an honor to serve on the Board. Thank you for your expression of confidence in appointing me.

After an interval to permit transmission of this letter to you, I plan to release it to the press. Nothing is more important to the welfare of the Commonwealth and its citizens than a justified confidence in the judicial discipline system. Public discussion of that system is therefore in the interest of all. Of course, my letter may prompt no public discussion, and also, I recognize that by no means will everyone agree with what I have said. Still, some public discussion regarding whether the Board should be restructured has already occurred, and some more, I hope, will occur. There are now pending in the General Assembly bills that would restructure the judicial discipline system along the lines recommended by the Judicial Reform Commission, and further discussion may direct greater public attention to those bills. May I, in any event, express the hope that you will examine the recommendations of the Judicial Reform Commission regarding restructuring the judicial discipline system, and to the extent that you find them persua-

sive, encourage their implementation.

Respectfully,

EDMUND B. SPAETH, JR.

Edmund B. Spaeth, Jr.

cc: The Members of the Judicial Inquiry and Review Board
The Executive Director and Chief Counsel of the Board

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

---

ss:

I, RICHARD A. SPRAGUE, ESQUIRE, being duly sworn according to law, depose and state that I am an attorney-at-law, admitted to practice law in the Commonwealth of Pennsylvania. Sometime during the Fall of 1980, I was appointed Special Counsel to head an investigation into alleged charges of official misconduct on the part of Justice Rolf Larsen in connection with his official duties on the Supreme Court of Pennsylvania. This appointment as Special Counsel was by the then Chief Justice of Pennsylvania, Honorable Henry X. O'Brien, as well as the Judicial Inquiry & Review Board of Pennsylvania.

Shortly after I received the appointment and upon undertaking my duties and responsibilities as Special Counsel in the Larsen matter, I was advised by Richard E. McDevitt, Esquire, then the Executive Director of the Judicial Inquiry & Review Board, that Justice Bruce W. Kauffman, at that time also a Justice of the Supreme Court of Pennsylvania, had furnished Mr. McDevitt information against Justice Larsen relative to the allegations of official misconduct by Justice Larsen that the Judicial Inquiry & Review Board was looking into at that time. Mr. McDevitt suggested that I, as recently appointed Special Counsel in the Larsen matter, personally contact and interview Justice Kauffman in order to investigate and determine in greater detail what information Justice Kaufmann possessed regarding the allegations of official misconduct in office by Justice Larsen.

Pursuant to that suggestion by Mr. McDevitt, I did, in fact, personally meet with then Justice Bruce W. Kauffman on numerous occasions during the investigation stages of the proceeding, during preparation for the presentation of testimony at the preliminary hearing in the Larsen matter and during preparation of the final hearing before the Board relative to the formal charges that were, in fact, ultimately filed against

Justice Larsen by the Judicial Inquiry & Review board. During these meetings between Justice Kauffman and myself, I conducted direct face-to-face interviews with him and personally discussed his personal views concerning Justice Larsen as well as what information that he felt that he had that would be helpful to me as special Counsel in my investigation and presentation of evidence concerning Justice Larsen before the Judicial Inquiry & Review Board.

During the course of those numerous meetings that I had with Justice Kauffman concerning the Larsen matter, Justice Kauffman frequently expressed to me his personal dislike of and his personal antagonism towards Justice Rolf Larsen. On a number of occasions during these meetings, Justice Kaufmann expressed to me his personal disdain for and personal animosity towards Justice Larsen and told me of his unalterable personal view that Justice Larsen had to be removed from the Supreme Court because he (Justice Kauffman) regarded Justice Larsen "as a dangerous person," "as having mental and emotional problems," "as an evil person," etc.

Justice Kauffman indicated to me that because of his dislike of Justice Larsen and because he felt the need for Justice Larsen to be removed from the Supreme Court, he, Justice Kauffman, had given information detrimental to Justice Larsen to The Philadelphia Inquirer.

It was obvious to me that Justice Kauffman was determined to do everything that was within his power to aid in having Justice Larsen removed from the Supreme Court of Pennsylvania. However, it should be noted that although Justice Kauffman was most desirous to be furnishing information against Justice Larsen, when it came time to testify face to face against Justice Larsen, Justice Kauffman did everything he could to avoid that direct confrontation and tried to water down his testimony.

From my contacts with Justice Kauffman, it is my opinion that Justice Kauffman could not be fair and impartial in any review of allegations against Justice Larsen concerning Justice Larsen's conduct on the Supreme Court of Pennsylvania. Furthermore, from my own contacts with Justice Kauffman and in view of what I have stated above, there would clearly be an appearance of impropriety in having Justice Kauffman have

any connection with the review of allegations of misconduct by Justice Larsen.

The foregoing statement, consisting of three (3) typewritten pages, has been read by me and the information contained herein is true and correct to the best of my present knowledge, information and belief.

RICHARD A. SPRAGUE

Richard A. Sprague, Esquire

SWORN TO AND SUBSCRIBED before me this 9th day of June, 1988.

FREDALEE SHENK

Fredalee Shenk, Notary Public

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
JUDICIAL INQUIRY AND REVIEW BOARD
MATTER NUMBER 140

ORDER

AND NOW, this 11th day of October, 1988, after hearing argument and after due deliberation, the Board, with six members sitting, unanimously finds that:

1) The charges filed on October 3, 1988 shall be deemed to have been filed pursuant to Judicial Inquiry and Review Board Rule of Procedure 2 rather than Judicial Inquiry and Review Board Rule of Procedure 8. Accordingly, Respondent shall have the right to file a written answer to said charges on or before October 24, 1988.

2) The October 3, 1988 charges were correctly and properly issued.

3) In the event the Board concludes a hearing is necessary concerning the October 3, 1988 charges, said charges shall be consolidated with the charges currently pending under Docket Number 140, and all charges shall be heard *ab initio* by the six sitting members. In the interim, the Board directs the panel currently hearing Board Matter 140 to suspend hearings on that matter.

BY THE JUDICIAL INQUIRY
AND REVIEW BOARD:

BRUCE W. KAUFFMAN

Bruce W. Kauffman
Chairman

COMMONWEALTH OF PENNSYLVANIA
JUDICIAL INQUIRY AND REVIEW BOARD

IN THE MATTER OF
HONORABLE ROLF LARSEN

BOARD MATTER NUMBER 140

ORDER

AND NOW, this 31st day of October, 1988, after due deliberation, the Board, with six members sitting, unanimously holds that:

1. Respondent's Application For a Stay of All Proceedings is denied;

2. Respondent's Notice to Plead is quashed since there is no basis for such a pleading or notice under the Rules of Procedure issued by the Supreme Court of Pennsylvania for the Judicial Inquiry and Review Board;

3. Respondent's Request for Oral Argument on the Supplemental Omnibus Application is denied;

4. Respondent's Application to Quash Additional Formal Charges III, IV and V is denied;

5. Respondent's Application for a Stay of Proceedings or Dismissal is denied;

6. Respondent's Application to Sever Charges is denied;

7. Respondent's Application for Dismissal of Charges III, IV and V for Lack of Specificity or Alternatively, More Specific Charges or For a Pleading in the Nature of a Bill of Particulars is denied except that the Board, following prior practices, will, upon the request of the Respondent's Counsel, provide the information and the identity of the witnesses it intends to present in its case in chief concerning the matters raised in Respondent's Application;